

IN THE
Supreme Court of the United States

FILED

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October Term, 1945.

No. 976

JACOB R. STEIN, charged as Jack R. Stein,

Petitioner,

vs.

UNITED STATES OF AMERICA,

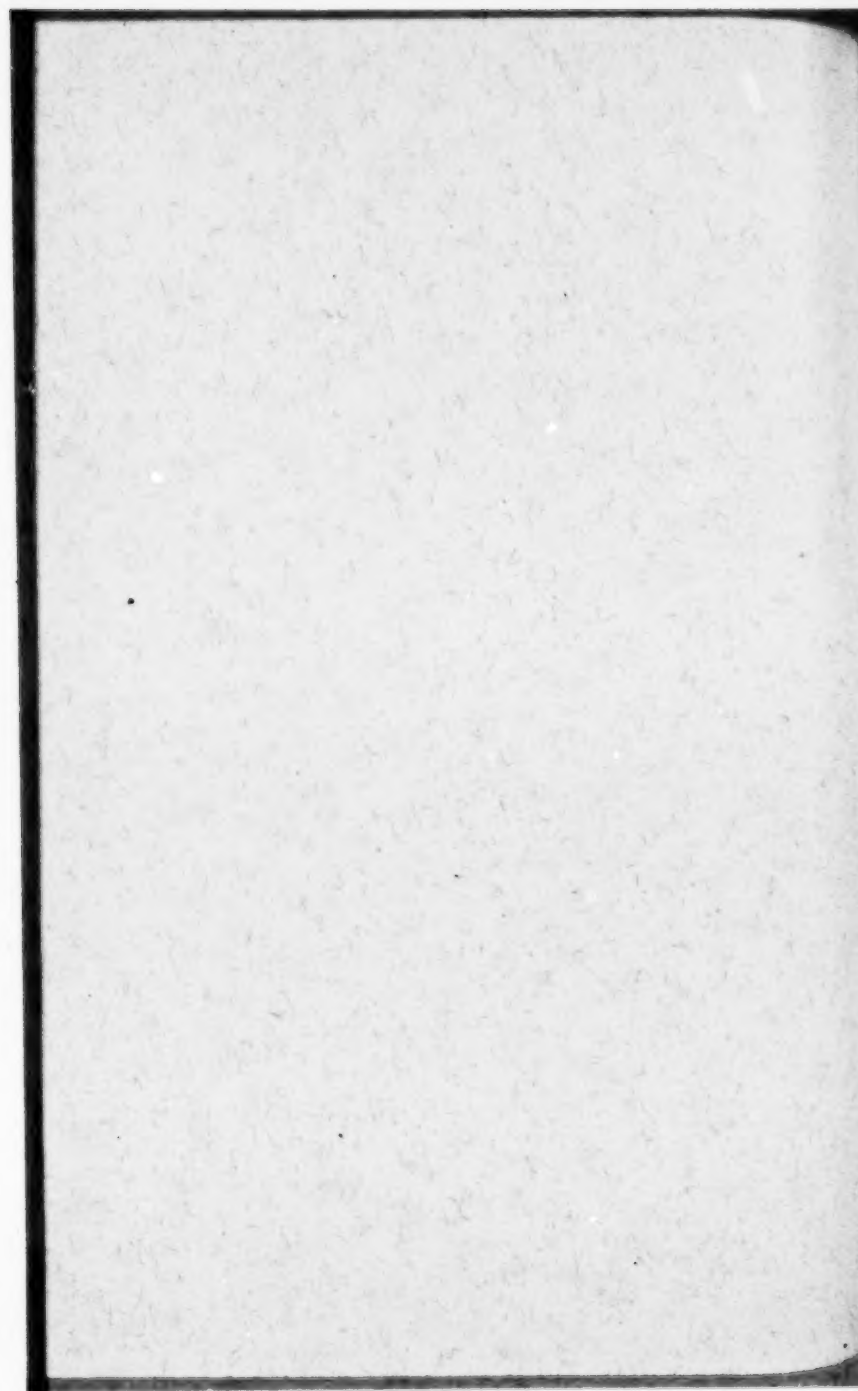
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.

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No.

JACOB R. STEIN, charged as Jack R. Stein,

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vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT.**

The above named Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above entitled cause on February 18, 1946. Said Judgment affirmed the judgments and sentences of the United States District Court for the Southern District of California, Central Division, as to Counts 2, 3, 5, 6, 7, 8, 9, 10, 12, 13 and 14 of the Amended Information, and reversed the judgments and sentences as to Counts 15, 16 and 17.

Introductory Statement.

Petitioner¹ was charged in an Information and thereafter by Amended Information, in seventeen Counts, with alleged violations of the Second War Powers Act.² Upon motion of the Government, Counts 4 and 11 of the Amended Information were dismissed before trial.

Pursuant to that Act, the President, through delegated authority to administrative heads of the War Production Board,³ issued numerous orders. One of those orders, War Production Board General Preference Order M-9-a,⁴ was endorsed on the Information and the Amended Information. This Act made the wilful violation of a WPB order a criminal offense.⁵

Upon trial the defendant, by verdict of the Jury, was found not guilty of Count 1 of the Amended Information, and found guilty as charged of Counts 2, 3, 5, 6, 7, 8,

¹Petitioner was the defendant and appellant and is herein sometimes referred to as "Stein."

²The Second War Powers Act is herein sometimes referred to as "Act." (Public Law 507, 77th Congress, Chapter 199, 2nd session; 56 Stat. 177; 50 U. S. C. A. Appendix, Sec. 633.)

³War Production Board, sometimes herein referred to as WPB."

⁴WPB General Preference Order M-9-a (7 FR 5980, 8825) sometimes herein referred to as "M-9-a."

⁵Section (5) of the Second War Powers Act provides, in addition to certain civil remedies for enforcement provided in Section (6), for criminal punishment for violation of any rule, regulation or order promulgated pursuant thereto, as follows:

"(5) Any person who wilfully performs any act prohibited, or wilfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both."

9, 10, 12, 13, 14, 15, 16 and 17. Upon appeal from the District Court, the Circuit Court of Appeals for the Ninth Circuit filed an Opinion June 30, 1945,⁶ reversing the judgments as to all Counts. Upon Appellee's petition for rehearing, the Circuit Court of Appeals, by its Opinion filed February 18, 1946,⁷ affirmed the judgments and commitments as to Counts 2, 3, 5, 6, 7, 8, 9, 10, 12, 13 and 14, and reversed the judgments as to Counts 15, 16 and 17.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered February 18, 1946. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. §347).

Questions Presented.

Stein was convicted on an Amended Information in seventeen Counts, charging violations of the Second War Powers Act, specifically alleging wilful violations of M-9-a issued pursuant thereto.

The Government dismissed two of the Counts before trial, and the trial proceeded as to fifteen of the Counts. The Jury found the defendant not guilty of the first Count and guilty as to the remaining fourteen. The Court sentenced Stein to one year's imprisonment on each count, to

⁶This Opinion is herein referred to as "First Opinion." It is not reported and is printed as Appendix "A" of this Petition.

⁷This Opinion is herein referred to as "Second Opinion." It is not yet reported and is set forth in the Transcript of Record filed on this application [R. 345].

run concurrently, and assessed a fine of \$25,000. The Circuit Court of Appeals in its First Opinion, reversed the conviction on all Counts. In its Second Opinion, the Circuit Court reversed the conviction as to three Counts and affirmed as to the remaining eleven.

The offenses charged related to a series of transactions, to wit, certain sales and delivery of insulated copper wire which the Government claimed constituted violations of WPB Order M-9-a.

The questions presented are:

(1) Whether the WPB regulations with respect to the sale and delivery of copper wire, including General Preference Order M-9-a, upon which the conviction was founded, were sufficiently certain and definite to constitute a valid basis for a criminal prosecution so as to constitute due process under the Constitution.

(2) Whether the conviction was founded on the provisions of an applicable regulation governing the sale and delivery of insulated copper wire in the transactions involved in the prosecution.

(3) Whether a conviction founded upon an Amended Information charging elements of an offense revoked prior to the alleged acts of the defendant, is a violation of due process of law.

(4) Whether a conviction founded upon a jury charge defining the crime in such a way as to contain revoked elements of said offense, is a violation of due process of law.

(5) Whether the evidence supports and constitutes proof sufficient to uphold a conviction for "wilful" violation of the Second War Powers Act.

(6) Whether the burden is upon the defendant to prove lack of "wilfulness," as in effect held by the Second Opinion of the Circuit Court of Appeals, where wilfulness is made a statutory element of the offense.

(7) Whether a verdict finding the defendant not guilty of one count and guilty of other counts of the Amended Information, is valid to support a judgment of conviction where as here all of the substantive acts were admitted by the defendant upon the trial, and the only issue of fact presented to the jury was the element of wilfulness required by the Act.

Dependent upon the answer to these major questions are presented the incidental questions as to—

(a) Whether the Court should have directed a verdict in favor of the defendant.

(b) Whether the jury was properly instructed as to the law.

(c) Whether the Court should have granted defendant's motion in arrest of judgment.

(d) Whether the Court should have granted a new trial.

(e) Whether the holding of the majority of the Court in *Dunn v. Illinois*, 284 U. S. 390 (1932), should be modified.

Statutes and Regulations Directly Involved.

The pertinent provisions of the Second War Powers Act (Public Law 507, 77th Congress, Chapter 199, 2nd session; 56 Stat. 177; 50 U. S. C. A. Appendix, Sec. 633), are set forth in Appendix B. The War Production Board General Preference Order M-9-a, as amended October 30, 1942 (7 FR 5980, 8825), is set forth in Appendix C.

Statement of the Case.

A. INTRODUCTORY.

This case involves prosecution for alleged violation of a WPB regulation in selling and delivering insulated copper wire. The acts complained of occurred when this Country was at the height of its production of war material. At the time of the alleged offenses, it can be estimated that there were in excess of five hundred different regulations of the WPB. The regulations were in constant state of change. New regulations were frequently issued, existing regulations were revised, amended and sometimes revoked. Any one engaged in commercial activity involving a number of different commodities was, as in the case of Stein, subject to a varying number of these and other wartime regulations.

The authority for the issuance of orders and regulations and the criminal sanction for violations thereof, is contained in the Second War Powers Act.

The facts of the case give rise to two principal inquiries. The *first* inquiry arises out of the regulations themselves—whether the regulations were sufficiently certain and definite to ground a prosecution, and whether the charges against Stein were based on regulations in existence at the time when the offenses were alleged to have been committed. The *second* inquiry arises out of the statutory requirement that the violation to be criminal must be “wilful”—whether the government sustained its burden of proof of Stein’s criminal intent in consummating the acts complained of, is an issue squarely presented.

This case in no sense involves any “black market” transactions. Nothing was done “under the table.” All of the transactions involved, indeed all of the sales by peti-

tioner of the copper wire in question, were made in the ordinary course of business, with full and complete records kept of each transaction.

B. THE FACTS.

Petitioner Stein organized and was sales manager of the Western Sales and Supply Company of Los Angeles, California, which company was set up to deal in and distribute aluminum and aircraft parts, but later handled salvage and other materials [R. 206].

In August, 1942, Lockheed Aircraft Corporation⁸ in Glendale, California, had in its possession and desired to dispose of an inventory of surplus materials consisting of a number of items and materials, including approximately 668,000 feet of insulated copper wire [R. 70, 72]. The materials had become "surplus" and obsolete by reason of engineering changes in the building of aircraft in which Lockheed was engaged. The copper wire was unusable by Lockheed or any other airplane company in the United States [R. 73]. Lockheed made numerous attempts during a period of ten months without success to dispose of the surplus inventory [R. 74].

Commencing in 1942, Mr. Taylor, representing Lockheed, negotiated with Stein for Stein's purchase of the surplus materials. There was a general discussion between Taylor and Stein relative to the difficulties resulting from Government directives and orders governing the control of the material being purchased, and both parties were unable to determine whether compliance was re-

⁸Lockheed Aircraft Corporation is herein referred to as "Lockheed."

quired with WPB regulations, or orders of the Army Air Force [R. 75, 172].

Stein not having had any prior experience with the class of materials purchased from Lockheed, employed an individual (the witness, Harry Cowan) who had formerly been employed by Vega Aircraft Corporation and who had a knowledge of these materials, to analyze, catalogue and assist in the distribution of these various items [R. 208, 194, 211].

The copper wire was a very small portion of the material purchased from Lockheed—less than five per cent.

The material was catalogued, an inventory was printed and sent by Stein to firms and Government agencies, including WPB, Army Air Forces, and Aircraft Scheduling Unit [R. 190]. With the catalogue went a covering letter offering the merchandise for sale, written by Stein, which included a paragraph reading:

“Priority Regulations must be complied with in full. We reserve the right to submit all orders to War Production Board for approval before shipping.” [R. 212; Gov. Ex. 7-A, R. 331.]

The catalogue also went to the office of the Army Air Forces, Western Procurement District office in Los Angeles, which was engaged in exercising control and routing of essential materials in the Los Angeles Metropolitan area [R. 213, 143, 135].

Mr. Tooker of that office shortly thereafter came to Stein's place of business, saw the material, and under date of November 16 sent Stein a letter, signed by his superior, Major Zwick, giving directions to Stein to dear all the materials, including the insulated copper wire, through the Army Air Forces office [R. 145-147, 213-215;

Gov. Ex. 6, R. 81]. Stein was told not to sell or distribute any of the materials until all the materials could be analyzed by the Army Air Forces [R. 144, 213]. Thereafter Stein cooperated with the office of Army Air Forces in the handling of the materials—including the copper wire [R. 147, 138]. He obtained clearance in the making of the sales of the material by following the procedure outlined to him by that agency [R. 136-217].

Under this procedure Stein promoted his sales by a series of sales letters sent to prospective purchasers [Gov. Ex. 3, R. 301; Deft. Ex. B, R. 307; Deft. Ex. C, R. 309]. In these letters there was the specific statement that priorities were not required for the copper wire purchase as the material had been cleared through the Army Air Forces. The sales made by Stein of copper wire covered a period from November 19, 1942 (three days after Major Zwick's letter of instructions [R. 81]), until September 30, 1943, immediately before the filing of the Information in this case on October 4, 1943 [Deft. Ex. I, R. 326]. Complete and exact records were kept of all transactions in regular books of account of Stein [R. 228]. The records were openly exhibited and made available to Government investigators. These revealed the name of the company to whom delivery of insulated copper wire was made, the address, the priority, quantity shipped, Stein's invoice number, and the date [R. 326]. Many of the deliveries were made to purchasers who furnished priority ratings higher than AA-5. In Government's Exhibit No. 4 [R. 303] is found the information which Stein freely furnished to the Government investigators revealing the information as to the deliveries made by Stein.

Stein delivered the copper wire to various other purchasers without receiving from the purchasers an order "*bearing the appropriate allocation classification and purchaser's symbol* (pursuant to Priorities Regulation No. 10), *and bearing a preference rating of AA-5 or higher.*" (General Preference Order M-9-a, as amended October 30, 1942; 7 FR 5980, 8825.) Note, however, that Priorities Regulation No. 10 was revoked on November 5, 1942 (7 FR 9028) which was approximately one month prior to the first alleged wrongful delivery of copper wire by Stein. (See discussion hereinafter under Point D-(1).)

On March 17, 1943, Mr. Burdge of the Compliance Division of WPB, came to Stein's place of business, asked for and received records of Stein's sales of copper wire. Notwithstanding complete information given by Stein disclosing his sales and manner of making through clearance with the Army Air Force, no notice or warning of any kind was sent to Stein. He continued thereafter to make sales in the same manner as theretofore, until the Information was filed in this case [R. 89, 191, 198, 234; Gov. Ex. 4, R. 303].

Stein testified as a witness in his own behalf. Numerous other witnesses also testified and documentary evidence was introduced. The *sole issue* to which the evidence was directed concerned the alleged "*wilfulness*" of Stein. It was stipulated or not contested, that the sales had been made by Stein to purchasers without procuring from said purchasers an order bearing the allocation classification, purchaser's symbol and preference rating of AA-5 or higher [*e.g.*, R. 96, 100, 102, 106, 107].

The Information filed October 4, 1943, against Stein, charged him as a "*dealer in copper wire*," with violation of WPB, General Preference Order M-9-a, in making seventeen separate deliveries of various quantities of copper wire to different purchasers at different times, without receiving from the purchasers "*an allocation certificate duly indorsed by the Director General for Operations*" [R. 2, *et seq.*].

An Amended Information filed November 8, 1943, upon which the case was tried, charged Stein as a "*person engaged in the business of distributing wire mill products to industry or trade*," with the same deliveries, and in each Count charged:

"said delivery was not made to fill an order bearing the appropriate allocation classification and purchaser's symbol and bearing a preference rating of AA-5 or higher, or bearing any allocation classification, purchaser's symbol, or preference rating whatsoever." [R. 14, *et seq.*]

Stein entered a plea of not guilty to each of the Counts of the Amended Information [R. 28]. The case was then tried before a Jury, concluding with a verdict of not guilty on the first Count and a verdict of guilty against the defendant on the remaining fourteen Counts [R. 33]. The judgment and sentence of imprisonment and fine was entered February 21, 1944 [R. 36].

C. THE CIRCUIT COURT OF APPEALS' OPINIONS.

The First Opinion of the Circuit Court of Appeals filed June 30, 1945, reversed the judgment upon the sole ground that "the evidence, if there is any, from which an intentional or deliberate disregard of WPB regulations may be invoked, is too tenuous to be held substantial." [Ap-

pendix A.] That Opinion summarized the evidence in the following language:

"We have mentioned every piece of evidence which might in any way suggest willingness on appellant's part to sell in violation of WPB regulations. We think the evidence reveals the situation where a man is confronted by confusing and overlapping jurisdictions. It describes a man who from discussions with various officials in good faith assumes that the Army Air Forces Procurement District is the controlling authority over the materials in his possession and who thereafter in good faith follows the procedure he understands is the proper one of clearing sales through that office." [Appendix A.]

Thereafter, upon motion of the Government, the First Opinion was withdrawn and the decision reversing the judgment vacated. Thereafter, the Circuit Court handed down its Second Opinion and judgment which by this petition is sought to be reviewed.

The Second Opinion differs from the First Opinion as to the law in regard to the requirement of the proof of wilfulness. Briefly, the difference is this: The First Opinion was premised on want of affirmative proof by the Government that an act to be in "wilful" violation of the law must be an act done with a bad purpose. The Second Opinion is not premised on the burden of the Government to prove the criminal intent, but rather that a defendant is burdened to show a plausible excuse for having done the acts complained of. The language used in the Second Opinion:

"There is no compelling inference from the testimony regarding the purported authority of the AAF that appellant did not willingly violate the law. We

cannot say that the evidence negatives the suggestion that appellant was seeking plausible excuses for making the sales in the absence of legal authority to make them." [R. 362.]

Thus it appears that the conviction of Petitioner has been upheld by the Circuit Court of Appeals on the somewhat unusual basis that defendant failed to demonstrate that his excuses were plausible. And this, notwithstanding the difficulties of determining precisely what the regulations permitted or condemned.

Those difficulties are not alone present in General Preference Order M-9-a, Sec. 933.2(c)(2) under which Stein was charged. M-9-a and that section itself is but one of many regulations to which a distributor of copper materials was subject.

D. WPB ORDERS AND REGULATIONS.

(1) M-9-a, §933.2(c)(2).

General Preference Order M-9-a, which Stein was informed against as having violated, from October 30, 1942, to March 4, 1943, provided in part as follows:

"(c)(2) . . . (a) No industrial supplier, mill supplier, plumbing supplier, or other person engaged in the business of distributing brass mill or wire mill products to industry or trade, shall deliver or cause to be delivered any brass mill product or wire mill product, unless such delivery is made to fill an order *bearing the appropriate allocation classification and purchaser's symbol (pursuant to Priorities Regulation No. 10)* and bearing a preference rating of AA-5 or higher." (Italics supplied.)

(a) *The Effect of Revocation of Priorities Regulation No. 10.*⁹

Priorities Regulation No. 10, referred to in M-9-a, was issued June 1, 1942 (7 FR 4198). It remained in effect until revoked on November 5, 1942 (7 FR 9028). The revocation of Priorities Regulation No. 10 was one of the steps taken by WPB in its entire reversal of procedure from what was the "Production Requirements Plan" to the "Controlled Materials Plan."¹⁰ Priorities Regulation No. 10 was therefore revoked before the time when Stein is charged with having committed the alleged wrongful acts. It was not again reinstituted.

Notwithstanding this revocation of Priorities Regulation No. 10, the Amended Information [R. 14, *et seq.*] and the charge to the Jury [R. 277], included the requirement that deliveries of copper wire be made only upon receipt by the seller of a purchase order bearing the endorsement of an appropriate allocation classification and purchaser's symbol. Both of these requirements were revoked prior to the alleged offenses. Stein was therefore charged with failure to obtain endorsements on the purchase orders, which endorsements were not required by War Production Board regulations at either the time of sale or delivery by Stein.

⁹A chart comparing the Amended Information, Charge to the Jury and M-9-a is contained in Appendix D.

¹⁰Further explanation of these plans, their background and purpose, is contained in Appendix E to this Petition under the heading: "The Background of Regulations: from PRP to CMP."

(b) *The Jury Instructions Failed to Note the Revocation of Priorities Regulation No. 10.*

The Second Opinion correctly noted that the allocation classification and purchaser's symbol "had an existence of their own separate and distinct from a preference rating." [R. 349.] The Second Opinion also correctly stated that the trial court instructed the jury "without noticing the change made by the elimination of the regulations." [R. 349.] The Circuit Court of Appeals construed this instruction to the jury as not being prejudicial to the Petitioner. But there was constitutionally hurtful prejudice in two respects. One, in being informed against and convicted on elements of a crime not present in the law. Two, in clouding the issue of wilfulness, since it may well make a substantial difference in determining criminal intent whether an alleged violator failed to perform in three respects or only in one.

(c) *Conviction Reversed as to Counts 15, 16 and 17 Because of March 4, 1943, Amendment to M-9-a.*

The sales made by Stein in Counts 15, 16 and 17, occurred after March 4, 1943, when Priorities Regulation M-9-a was itself amended. As to these Counts, the Second Opinion correctly held that no jury instruction covering the governing law as it existed at that time, was given, and for that reason the judgment of conviction as to Counts 15, 16 and 17 must be reversed.

(2) Uncertainty and Ambiguity of Orders and Regulations as Applied to Transactions in This Case.

For a business man to determine whether or under what circumstances he may sell copper wire, he must look to regulations other than General Preference Order M-9-a, Sec. 933.2(c)(2):

(1) *Section 933.2(b)(1) of General Preference Order M-9-a.* He is immediately confronted with Section 933.2(b)(1), under which a dealer in "copper" may deliver copper, not upon receipt of allocation classification, purchaser's symbol and priority rating, but upon receipt of an "allocation classification duly issued by the Director General for Operations." (Parenthetically, it may be pointed out that the Information [R. 2, *et seq.*] was drawn in the wording of this Section 933.2(b)(1) of WPB Regulation M-9-a.)

(2) *Priorities Regulation No. 13.*¹¹ He must look to Priorities Regulation No. 13 to determine if he is making a sale thereunder, for insulated copper wire is one of the materials governed thereby. If he is governed by Priorities Regulation No. 13, then to some classes of purchasers he may sell upon a priority rating of AA-5 or higher, and to other classes, without any priority.

The sales charged in Counts 5, 6, 7 and 9, were at least initially indeterminable as to whether they were governed by those provisions of Priorities Regulation No. 13 that permitted sales to be made without a priority. One was a sale to a class of "wholesale dealers who sell the material in the form held by holder." Three were

¹¹Priorities Regulation 13 (7 FR 7523) is reprinted in Appendix F.

sales of less than \$100.00, which could be construed to come within War Production Board Release No. WPB-1489, issued July 7, 1942 (C. C. H., War Law Serv., par. 3092.10), reading in part: .

"5. Q. To whom can 'special Sales' of 'War Materials' be made? A. (d) In individual lots of an aggregate price of less than \$100.00."

(3) *Priorities Regulation No. 1*.¹² In *Priorities Regulation No. 1* he is notified that there is legal compulsion to accept and fill defense orders.

During the applicable times, *Priorities Regulation No. 1* required the compulsory acceptance and fulfillment of Defense Orders:

"Compulsory acceptance of defense and other rated orders. Defense Orders for any material and all other purchase orders bearing preference ratings, including both A and B ratings (hereinafter called 'other rated orders'), must be accepted and filled in preference to any other contracts or purchase orders for such material, . . ." (Sec. 944.2, *Priorities Regulation No. 1*, 6 FR 6681, December 24, 1941.)

The evidence on some of the Counts reveals that the defendant Stein sold to purchasers who were operating under a preference rating of A-10, or were purchasing as a Defense Order [as to Count 2, R. 99; as to Count 3, R. 100; as to Count 5, R. 101; as to Count 6, R. 101; as to Count 7, R. 108], and hence these sales may have been compulsory orders under *Priorities Regulation No. 1*.

¹²⁶ FR 6681.

E. CONGRESSIONAL LEGISLATION AND ADMINISTRATIVE
"LEGISLATION" COMPARED.

Crystal-clear formulae for action may well be impossible to prescribe in every one of the multitudinous regulations that come from the grist mill of an executive agency responsible for production of goods for a total war. We acknowledge that clarity is for practical purposes a matter of degree.

But the judicial requirement for clarity may well vary with the instrumentality of government doing the legislating. *This Court has not expressed its views concerning the required definiteness of administrative "legislation,"* although it has done so respecting Congressional and State legislation. Important distinctions between them can and perhaps should be made. Congress is burdened with the necessity for political compromise—an administrative agency is not so burdened. Congress has neither the means nor the time to make detailed inquiry necessary to perform the regulatory function in any complicated sphere of our national economy; whereas, the administrative agency is given precisely such responsibility. The Second War Powers Act is a splendid illustration. The Act is the skeleton, the administrative agency fills in the details.

The judicial requirement for clarity may well vary in another respect. It may vary with the enforcement procedure employed. If the purpose be to enforce compliance of the regulation by the issuance of a suspension order within the agency itself,¹⁸ then the clarity need only be enough to constitute a general warning that the spirit

¹⁸For example, *L. P. Stewart & Bros. v. Bowles*, 322 U. S. 398 (1944).

of the regulation is violated. In such a procedure, the liberty of the individual is not at stake. If, however, the purpose be to prosecute criminally an individual for a wilful violation of a regulation, then a far greater degree of clarity should be required—a degree of clarity not present in Stein's prosecution.

There were within the War Production Board agency itself, ample methods of securing compliance with its regulations. Chief among these was the suspension order.¹⁴ We urge that the Court may consider that the degree of definiteness of the regulations to ground the valid issuance of a suspension order may well fall short of the degree of definiteness in the same regulation required to sustain a conviction. Compliance procedures within the agency do not, as does a criminal prosecution, subject the individual to the loss of his liberty.

A criminal prosecution subjects the individual, *eo instante*, to a test of his liberty. A compliance procedure within the agency tests the regulation, and if favorable to the agency, culminates in a specific order, directed to a specific individual, to do or refrain from doing specific acts. Thereafter a violation is clear cut.

F. QUESTION PRESENTED IS OF GREAT PUBLIC INTEREST.

Regardless of the interest of the Petitioner, it is submitted that under these circumstances a review of the issues of this case and a determination of the law are matters of greatest public concern. Equally, during the era of reconversion to peace as during that of conversion to war and war production, and the period of administra-

¹⁴O'Brian and Fleischmann, *The War Production Board Administrative Policies and Procedures*, 13 Geo. Wash. L. Rev. (1944).

tive controlled economy which is current, and which it is of *prime importance for the Supreme Court to set the standards of certainty and clarity in promulgating administrative production regulations and the requisite criminal intent to sustain a conviction* for their violation.

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

(1) In affirming the judgment and sentences of the District Court as to Counts 2, 3, 5, 6, 7, 8, 9, 10, 12, 13 and 14.

(2) In upholding the constitutionality of War Production Board General Preference Order M-9-a, issued pursuant to the Second War Powers Act.

(3) In failing to find error in the instructions of the District Court.

(4) In holding that the prosecution sustained its burden of proof on the issue of wilfulness sufficient to support a verdict of guilty.

(5) In failing to order a new trial.

(6) In failing to hold that the WPB orders and regulations applicable to the transactions involved in this prosecution were so uncertain and vague as to constitute want of due process sufficient to be a basis for criminal prosecution.

(7) In failing to hold that certain rulings relating to the admission of evidence were error. These errors are subordinate to the major errors and are not here urged as a basis for granting the petition.¹⁵

¹⁵Appendix F, attached, is a discussion of certain errors of the Circuit Court in its opinion, here sought to be reversed.

Reasons for Granting the Petition.

The Second War Powers Act makes it a crime where any person "wilfully performs any act prohibited, or wilfully fails to perform any act required by, any . . . rule, regulation, or order" promulgated by the President, or any agency established thereunder. To govern the production economy, the President, pursuant to authority granted him under the Second War Powers Act, set up appropriate agencies. The War Production Board, successor in aid of production control, to Supply Priorities and Allocation Board, and Office of Production Management, was established by executive order as the principal agency to control the nation's production.¹⁶

Numerous orders and regulations of varying types were issued by WPB to govern production, distribution and use of commodities from raw to finished product. The whole body of these orders and regulations in their entirety is the explication of the Second War Powers Act—they constitute in effect a body of "statutory law" defining and prescribing methods of production, distribution and use of critical materials.

To business men governed by the War Production Board, no single order stands alone, for each order must be examined with all others to determine permissive or compulsory courses of action. Furthermore, the controls, like the war of which they are a part, are changing and volatile. Their chief purpose is to secure goods for war and to further and speed the movement and use of goods in appropriate production channels.

¹⁶Ex. Order No. 9024, 7 FR 329 (1942).

Government is not here engaging in its more traditional activity as arbitrator or referee. Government is here essentially ordering and directing the activities of citizens and business men in our whole production economy.

The WPB did not afford business men a procedure for obtaining a binding interpretation or clarification of its regulations, although such procedure cannot be inimical to wartime activity. It is to be noted that the Office of Price Administration makes it available.¹⁷ Yet the WPB has available to itself administrative procedure for accomplishing action through directives or of correcting improper action through compliance procedures within the agency itself.¹⁸ No intra agency procedures were followed or attempted in this case and there was not available to Stein any method for securing legally binding interpretative instructions.

This case at once affords opportunity, and shows the necessity, for the Supreme Court to determine the standards of certainty and clarity required where orders and regulations in such a dynamic program are involved. While the national interest to secure maximum production is of paramount importance, yet the methods used to aid such interest must not invade the individual's constitu-

¹⁷Revised Procedural Regulation No. 1—Procedure for Issuance, Adjustment, Amendment, Protest and Interpretations of Maximum Price Regulations (issued November 2, 1942, 7 FR 8961).

¹⁸O'Brian and Fleischmann, *The War Production Board Administrative Policies and Procedures*, 13 Geo. Wash. L. Rev. 1, 46 (1944).

tional rights, especially where administrative procedures and civil injunction can be forcibly, quickly and effectively employed in aid of the nation's paramount interest. The interest of Government to secure production, and the civil remedies available (intra agency compliances as well as court injunction) to accomplish these objectives, are to be weighed against the interests of individuals who should not be "required at peril of life, liberty and property to speculate as to penal statutes."¹⁰

Petitioner, once exonerated of any crime, stands before this court, his liberty jeopardized by a decision predicated upon an opinion which in no wise informs him as to what new consideration, or facts, or law, transforms acts once found to be innocent of criminal intent, to be venal and wilful. No reasons are assigned as to why the same three judges "changed their minds." No pressure by government in an attempt to bolster its insistence that a thoroughly confusing and partially revoked mass of "administrative legislation" can be made the basis of a criminal prosecution and conviction, can justify the Circuit Court's revised position. The anxiety of the government—and the WPB—to prosecute and to sustain a conviction is understandable. But, we most respectfully insist, the action of the court sought to be reviewed is not. Petitioner, with his liberty in jeopardy, prays this court's aid and protection in the most fundamental of rights—his right to due process under our law.

¹⁰*Lanzetta v. New Jersey*, 306 U. S. 451 (1939).

Conclusion.

We submit that consideration of the Second Opinion of the Circuit Court of Appeals amply demonstrates the need for a review in this case of the degree of definiteness which should be required in orders and regulations of a government agency in order to ground a criminal prosecution, the exactness required in a criminal prosecution and charge to a jury, as well as the degree of proof of wilfulness to sustain a conviction.

No attack is here made on the constitutionality of the Second War Powers Act. While the constitutionality of the Act is and was presumed at all stages of the prosecution, *the constitutionality of the orders and regulations issued thereunder and which pertain to the transactions here involved, when made the basis of a criminal charge*, were and are put in issue. Having in mind the constitutional issue thus raised, the defendant could not and should not have been convicted.

Even if one felt that acts such as were committed by Stein, should be punished, nevertheless "the evidence reveals the situation where a man is confronted by confusing and overlapping jurisdictions. It describes a man who from discussions with various officials in good faith assumes that the Army Air Forces Procurement District is the controlling authority over the materials in his possession and who thereafter in good faith follows the procedure he understands is the proper one of clearing sales through that office." (First Opinion.) That which Stein did was not defined as a crime by a law made plain to "men of common intelligence."

The manifest uncertainties in WPB orders and regulations as applied in the instant case, are given pointed

emphasis by the ineptitude of WPB itself, the prosecution's filing of an Information under a different provision of the regulation than that under which Stein was found guilty, the prosecution's filing of an Amended Information charging elements of a violation theretofore revoked, the errors in the charge to the jury, the inconsistency of the verdict on precisely similar facts, and the reversal by the Circuit Court of Appeals of its First Opinion—these all illustrate the uncertainties and consequent need for consideration and decision by this Court of the essential constitutional issues involved.

There is the gravest danger, not only to unintentional law-breakers, but to the public generally, in defining an offense of this character in such vague terms that in times of stress and public excitement, business men, encouraged to produce and aid production, may be subjected to criminal prosecution for actions which had but recently been left entirely to the free, unregulated exercise of the right to buy, sell and use goods. The correct and constitutional construction of the Second War Powers Act, and of the proper boundaries of "legislation" by executive agencies, therefore presents an issue of great public importance which we believe merits the consideration of this Court. Wherefore, we urge that the petition for writ of certiorari be granted.

Respectfully submitted,

ISAAC PACT,

CLORE WARNE,

LOUIS M. BROWN,

Attorneys for Petitioner.

APPENDIX A.

In the United States Circuit Court of Appeals for the Ninth Circuit.

Jacob R. Stein charged as Jack R. Stein, Appellant, vs., United States of America, Appellee. No. 10,694. Jun. 30, 1945.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Before: Mathews, Stephens and Healy, Circuit Judges. Stephens, Circuit Judge.

An information containing seventeen counts charged defendant with violating War Production Board (WPB) General Preference Order M-9-a, promulgated pursuant to the Second War Powers Act, 50 U.S.C.A. App. § 633. Two of the counts (4 and 11) were dismissed; the jury found defendant not guilty as to count 1; he was convicted and sentenced as to the remaining fourteen. He appeals.

Each count charged that appellant on a certain date, the dates ranging from December 3, 1942, to March 16, 1943, did wilfully and unlawfully deliver a stated quantity of a wire mill product, namely insulated copper wire, to a purchaser; that said delivery was not made to fill an order bearing appropriate allocation classification, purchaser's symbol, and preference rating of AA-5 or higher, or bearing any allocation classification, purchaser's symbol, or preference rating whatsoever; that said delivery was not expressly authorized by the Director General for Operations; that appellant thereby wilfully diverted said wire mill product from the war effort of the United States.

Appellant was organizer and sales manager of a company which originally dealt in aluminum and aircraft

parts and subsequently handled salvage and other materials.

In September, 1942, appellant purchased an inventory of materials, including insulated copper wire, which was no longer usable by the owner, Lockheed Aircraft Corporation (Lockheed), in war or defense products. The materials were inventoried and catalogued, and in October a printed inventory was sent to various firms and government agencies, including WPB, Aircraft Scheduling Unit, and the Western Procurement District office of the Army Air Forces, which office was engaged in exercising control over and routing essential materials in the area. The engineering division of the Procurement District office advised appellant not to sell certain materials until he obtained written releases from that office. On several occasions thereafter telephonic requests for permission to sell were verbally answered in the affirmative; sales were made in accordance therewith, and no disapproving notice of any kind was received by appellant until the information herein was filed on October 4, 1943.

Following the practice just outlined appellant did not require any allocation classification, purchaser's symbol, or preference rating of AA-5 or higher on purchase orders.

The Second War Powers Act, Title III, § 2(a)(5), 50 U.S.C.A. App. § 633, 2(a)(5), defines offenses under the Act in the following terms: "Any person who wilfully performs any act prohibited, or wilfully fails to perform any act required by, any provision of this subsection (a)

or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both." A violation of WPB Order M-9-a falls squarely within the quoted language. The definition fixes two requirements, the performing of a prohibited act and the performing of it wilfully.

"Wilfully" has been held to mean "deliberately and with a specific purpose to do the acts proscribed by Congress." *Hartzel v. United States*, 322 U. S. 680, 686 (1944). The Supreme Court has observed that "when used in a criminal statute it [wilfully] generally means an act done with a bad purpose * * *; without justifiable excuse * * *; stubbornly, obstinately, perversely * * *." The word is also employed to characterize a thing done without ground for believing it is lawful * * *, or conduct marked by careless disregard whether or not one has the right so to act * * *." *United States v. Murdock*, 290 U. S. 389, 394 (1933). Applying the accepted meaning of the word to the requirement of wilfulness as provided in the Second War Powers Act, the doing of a prohibited act deliberately and perversely by an accused person is necessary to the commission of the offense.

Of course, the judgment cannot be sustained unless substantial evidence supports the verdict. See discussion of the point in *Hartzel v. United States*, 322 U. S. 680, and *Craig v. United States*, 81 Fed. 2d 816, 827 (C. C. A.

9, 1936). We find no such evidence of appellant's wilful conduct in the record.

In negotiating the purchase of the copper wire and other materials between his company and Lockheed, appellant discussed priority regulations with Lockheed's representative. The latter testified to appellant's carefully expressed statement that he wished to comply with existing regulations of the WPB or of any other government agency. The last sentence of the purchase order declares: "It is also understood that we as buyers, will not under any consideration release any of this material to anyone not in a position to furnish proper priorities or conformance with all rules and regulations as prescribed by the War Production Board." The materials received from Lockheed were inventoried, and a printed catalogue was prepared and marked to various government agencies and civilians who might use the materials. An accompanying letter bore the statement: "Priority regulations must be complied with in full. We reserve the right to submit all orders to the War Production Board for approval before shipment." At the outset, then, appellant revealed no purpose to violate WPB regulations but instead a purpose to comply with them.

Subsequently when appellant sold the copper wire, the evidence is overwhelming that he entertained a genuine belief that sales made under permission from representatives of the Western Procurement District, Army Air Forces, sufficiently complied with priority requirements

applicable in the circumstances. One such representative, Mr. Tooker, on visiting appellant's plant before any of the sales were made, informed appellant that his office controlled certain materials, such as aluminum bar and certain aircraft instruments, and that clearance for sales of those items would have to be obtained from it. Appellant received a confirming letter from Major Zwick of that office, stating that a release in writing from that office should be obtained for the sale of strategic materials. Thereafter, appellant phoned Mr. Tooker's office several times asking for various releases, which were sometimes granted and sometimes refused. As to materials not considered strategic, appellant was told to use his own discretion. No written release was ever given for any of the various sales made. Mr. Tooker's testimony shows a practice of handling the matters by telephone. At no time was copper wire specifically adverted to in the mention of those items requiring official release.

Appellant was referred by Mr. Tooker to Mr. Chapman, a materials coordinator in the Western Procurement District office, and, upon being asked permission to dispose of copper wire, Chapman stated to appellant that if the wire had been purchased from Lockheed as obsolete or surplus, he had no jurisdiction over it, and appellant could do as he pleased with it, sell it to anyone he wanted to.

Major Vockrodt, chief of the redistribution and salvage section of the Western Procurement District office, testified that he had never purported to issue a release from

WPB orders, and Major Zwick declared that his office had no jurisdiction over the disposition of surplus materials. However, it does not appear that appellant was aware of the lack of jurisdiction of the Procurement District office, and he proceeded in accordance with his belief as to the intent of Mr. Chapman's statement—that he could do as he pleased with the copper wire.

In November of 1942 and before any of the copper wire sales were made, Mr. Sullivan, district manager of the WPB Redistribution Division, in specifically discussing the sale of steel and adverting to the denial of appellant's application to deal in allocated materials, requested that appellant refrain from dealing in steel, copper and aluminum until the appeal had been heard from. No mention of insulated copper wire was made, and, of course, the sale of obsolescent materials purchased from Lockheed would not have been directly mentioned since Mr. Sullivan knew nothing about that transaction at the time of the discussion. The appeal was subsequently denied.

Later and after the Lockheed purchase, appellant was told by Mr. Daniels, a WPB materials redistribution analyst that the Army Air Forces had complete control over surplus inventories in the hands of aircraft producers. Lockheed, as is well known, was one of the principal aircraft producers of the world. Daniels testified, however, that he had nothing to do with the sale of such materials. He testified that he had not discussed with appellant the matter of permission to sell the surplus materials.

On March 17, 1943, subsequent to the last sale charged in the indictment, a WPB investigator visited appellant's

plant and examined appellant's books and records. Appellant remarked at that time: "We do not feel very kindly to the War Production Board, and we have decided that if they will let us alone, we will let them alone." The investigator was asked whether it was all right to continue selling copper wire without preference rated orders; he replied that it was not his function to make a statement in reply to such a question. Further copper wire sales were made thereafter.

It should be emphasized that the copper wire was disposed of openly with no attempt to secrecy and that complete records open to government officials at all times were kept of all sales.

We have mentioned every piece of evidence which might in any way suggest willingness on appellant's part to sell in violation of WPB regulations. We think the evidence reveals the situation where a man is confronted by confusing and overlapping jurisdictions. It describes a man who from discussions with various officials in good faith assumes that the Army Air Forces Procurement District is the controlling authority over the materials in his possession and who thereafter in good faith follows the procedure he understands is the proper one of clearing sales through that office. The evidence, if there is any, from which an intentional or deliberate disregard of WPB regulations may be inferred is too tenuous to be held substantial.

Reversed.

(Endorsed.) Opinion. Filed Jun. 30, 1945. Paul P. O'Brien, Clerk.

APPENDIX B.

Pertinent provisions of Second War Powers Act, 50 U.S.C.A. 1944 Appendix Sec. 633: (Subsection (a) of Sec. 2 of Act of June 28, 1940; 54 Stat. 676) Title III—Priorities Power—of the Second War Powers Act, 1942, as amended, can be summarized as covering certain general subjects. It has to do with powers and authority granted to the executive in aid of the effective prosecution of the war, and deals with (1) Contracts for construction of vessels and other contracts; (2) Power to determine priorities and allocate materials and issue regulations and orders in aid thereof; (3) Record keeping requirements; (4) Compelling attendance of witnesses, subpoenas, etc.; (5) Criminal sanction; (6) Jurisdiction of courts for civil or criminal actions; (7) Giving to persons whose compliance with regulations may result in default under any contract, and excuse from liability due to such default; (8) Authority of President to delegate his powers.

It provides, relative to punishment for violation of any rule, regulation or order promulgated pursuant thereto, as follows:

“(5) Any person who wilfully performs any act prohibited, or wilfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both.”

APPENDIX C.

War Production Board.

Part 933—Copper

[General Preference Order M-9-a as Amended October 30, 1942.]

Whereas the national defense requirements have created a shortage of copper, copper base alloys and products thereof, as hereinafter defined, for defense, for private account, and for export, and it is necessary in public interest and to promote the defense of the United States, to conserve the supply and direct the distribution thereof:

Now, therefore, it is hereby ordered:

§933.2 *General Preference Order M-9-a—(a) Definitions.* For the purpose of this order:

(1) "Copper" means copper metal which has been refined by any process of electrolysis or fire refining to a grade and in a form suitable for fabrication, such as cathodes, wire bars, ingot bars, ingots, cakes, billets, wedge bars or other refined shapes, or copper shot or other forms produced by a refiner.

(2) "Copper base alloy" means any alloy in the composition of which the percentage of copper metal by weight equals or exceeds 40% of the total weight of the alloy.

(3) "Refiner" means any person who produces copper, as hereinbefore defined from copper-bearing material or scrap by any process of electrolysis or fire refining; "re-

finer" also includes any person who has such copper produced for him under toll agreement.

(4) "Dealer" means one who receives physical delivery of copper and sells or holds the same for sale without change in form.

(5) "Brass mill product" means sheet, wire, rod or tube made from copper or copper base alloy.

(6) "Wire mill product" means bare or insulated wire or cable for electrical conduction made from copper or copper base alloy.

(b) *Allocation of copper*—(1) *Deliveries of copper by dealers or refiners.* No delivery of copper shall be made by any dealer or refiner except upon presentation by the person requesting the delivery of an allocation certificate duly issued by the Director General for Operations (hereinafter called the Director); except that notwithstanding the foregoing, copper of foreign origin imported under bond or drawback agreement may be reexported by a refiner pursuant to an export license duly issued by the Office of Export Control, Board of Economic Warfare.

(2) *Applications for allocations.* All persons who require copper shall make application on Form PD-59 to the Copper Branch, War Production Board, for allocation certificates entitling them to specified amounts of copper to be delivered to them by refiners or dealers.

(3) *Basis of allocation.* Allocation of copper will be made by the Director to assure the satisfaction of the most

essential requirements. After the satisfaction of such requirements, the residual supply may be allocated by the Director for other necessary uses to the extent possible.

(4) *Acceptance of delivery.* No person shall accept the delivery of any copper if he has reason to believe such delivery would be in violation of this order.

(c) *Deliveries of brass mill products or wire mill products.* Except as expressly authorized or directed by the Director:

(1) No brass mill or wire mill shall fill any order which has not been approved on a Form PD-59D.

(2) No industrial supplier, mill supplier, plumbing supply house or other person engaged in the business of distributing brass mill or wire mill products to industry or trade, shall deliver or cause to be delivered any brass mill product or wire mill product, unless such delivery is made to fill an order bearing the appropriate allocation classification and purchaser's symbol (pursuant to Priorities Regulation No. 10) and bearing a preference rating of AA-5 or higher.

(5) No person shall accept the delivery of any brass mill product or wire mill product if he has reason to believe such delivery would be in violation of this order.

(d) *Deliveries of foundry products or copper base alloy ingots.* Deliveries of foundry products and copper base alloy ingots shall be made only in accordance with the provisions of Supplementary Copper Order No. M-9-b.

(e) *Toll agreements.* (1) No person shall process any copper, brass mill product, or wire mill product acquired prior to July 1, 1942, under any existing or future toll agreement, conversion agreement, or other form of agreement by which title remains vested in a person other than the one processing the material, or which agreement is contingent upon repurchase of such materials in any quantities equivalent or otherwise by the person delivering the material, unless and until such an agreement shall have been approved by the Director. Any person desiring to have such an agreement approved must file with the War Production Board, a statement setting forth the names of the parties to such agreement, the material involved as to kind and grade (except copper scrap for which provision is made under Supplementary Copper Order No. M-9-b), the form of the same, the estimated tonnage involved, the estimated rate of delivery, the length of time such agreement or other similar agreement has been in force, the duration of the agreement, the purpose for which the copper, copper base alloy or copper product is to be used, and any other pertinent data that would justify such approval.

(2) All refiners who are parties to toll agreements for the refining of copper (who have not already filed the information with the Director) must file with the War Production Board, a statement setting forth the names of the parties to such agreement, the material involved, whether blister, scrap or in other form, the estimated tonnage involved, the estimated rate of delivery, and the duration

of the contract. A like statement must be filed with reference to any new agreement or amendment to existing or new agreements within ten days after the effective date of such new agreement or amendment respectively.

(f) *Addressing of communications.* All applications, statements, or other communications filed pursuant to this order or concerning the subject matter hereof should be addressed War Production Board, Ref: M-9-a, Washington, D. C.

(g) *Violations.* Any person who wilfully violates any provision of this order, or who, in connection with this order, wilfully conceals a material fact or furnishes false information to any department or agency of the United States is guilty of a crime, and upon conviction may be punished by fine or imprisonment. In addition, any such person may be prohibited from making or obtaining further deliveries of, or from processing or using, material under priority control and may be deprived of priorities assistance.

(h) *Effective date.* This order shall take effect August 1, 1942.

(P.D. Reg. 1, as amended, 6 F.R. 6680; W.P.B. Reg. 1, 7 F.R. 561; E.O. 9024, 7 F.R. 329; E.O. 940, 7 F.R. 527; E.O. 9125, 7 F.R. 2719; sec. 2 (a), Pub. Law 671, 76th Cong., as amended by Pub. Laws 89 and 507, 77th Cong.)

APPENDIX D.

Chart showing correlation between (a) Dates of alleged offenses, (b) Amended information, (c) Jury charge and (d) M-9-a.

Date	The Amended Information	The Charge to the Jury	The Law
Prior to Nov. 5 1942	(No offenses are charged against Stein)		Deliveries of copper wire pursuant to Order M-9-a may be made to fill an order bearing: 1. Appropriate allocation classification.) pursuant 2. Purchaser's symbol.) to 3. Preference rating) PR. 10 AA-5 or higher.
Nov. 5 1942 to Mar. 3, 1943	FIRST 14 COUNTS Deliveries were not made to fill an order bearing: 1. Appropriate allocation classification. 2. Purchaser's symbol. 3. Preference rating of AA-5 or higher.	Delivery cannot be made unless it is made to fill an order bearing: 1. Appropriate allocation classification. 2. Purchaser's symbol. 3. Preference rating of AA-5 or higher. [R. 277]	Deliveries of copper wire may be made to fill an order bearing: 1. Appropriate allocation classification.) pursuant 2. Purchaser's symbol.) to 3. Preference rating of AA-5 or higher. (Note: on Nov. 5, 1942, PR. 10 was revoked)
Mar. 3, 1943 and thereafter	LAST 3 COUNTS Deliveries were not made to fill an order bearing: 1. Appropriate allocation classification. 2. Purchaser's symbol. 3. Preference rating of AA-5 or higher.	Delivery cannot be made unless it is made to fill an order bearing: 1. Appropriate allocation classification. 2. Purchaser's symbol. 3. Preference rating of AA-5 or higher. [R. 277]	Deliveries of copper wire may be made to fill an order: 1. As permitted by CMP Regulation #4. (Note: CMP, among other things, established an entirely new system of allotment numbers. These numbers are entirely different from anything theretofore)

APPENDIX E.

The Background of Regulations: From PRP to CMP.

The revocation of Priorities Regulation No. 10 in November 1942, and the amendment to General Preference Order M-9-a in March 1943, evidence two stages in the War Production Board's switch from what was the "Production Requirements Plan" to the "Controlled Materials Plan." Priorities Regulation No. 10 was a regulation apparently made necessary by the Production Requirements Plan to insure the fair and efficient working of priorities and allocations. It was made unnecessary by the Controlled Materials Plan.

An understanding of the nature of the Production Requirements Plan and its defect is a prerequisite to understanding the reason why the Controlled Materials Plan was inaugurated by the War Production Board. An understanding of these plans is necessary in order to give meaning to the requirement for an allocation classification and a purchaser's symbol, the destruction of that requirement; the requirement for a preference rating, the destruction of that requirement; and the substitution of the Controlled Materials Plan.

As succinct a statement as has been found of the Production Requirements Plan, its defect, and the Controlled Materials Plan, is taken from, 3 Business Control Coordinator 24,006:

"R. 13. Production Requirements Plan. The first tentative step in these directions [rationalization and control of production and distribution of war materials] was the Production Requirements Plan, which attempted to allot balanced quantities of different materials to every important metal-using plant for three months in advance. However, P.R.P. suf-

ferred from one basic defect which soon proved fatal—it attempted to allot materials without assuming control over production programs and schedules.

“Under P.R.P., a prime contractor could never be sure that his subs were getting all the material they required to complete the parts he needed to make full use of his materials. A manufacturer of an urgent munitions item might have been cut back only 20%, or not at all—but four of his important sub-contractors might have been scaled down 40% or 60% on the materials they requested. The inevitable results were tanks without treads, planes without propellers and colossal wastes of scarce materials tied up in unfinished end products and parts. Hardly six months after it had been placed in operation P.R.P. had to give way to the Controlled Materials Plan, announced in November, 1942.

“R. 14. Controlled Materials Plan. CMP began as an attempt to adjust programs of the several claimants on essential production in terms of the expected supply of steel, copper and aluminum. The assumption was that a war production program scaled down so as not to exceed the supply of any one of these basic metals would not seriously overload the supply of other materials. Moreover, by making vertical allotments of these metals through precisely the same channels used in placing contracts and setting production schedules, some coordination between control of materials and control of schedules could be achieved. Under CMP, contract, order, schedule and allotment can all be tied together.”

The Production Requirements Plan was designed to work, in part, as follows: Each purchaser of materials

coming under the PRP was to state on his purchase order the allocation classification of the materials which he purchased and his purchaser's symbol. A copy of each of such purchase order was to be sent to the proper government office and there analyzed and classified. Quantities of materials needed in industry were thus to be determined so that the War Production Board could know the extent of the requirements for particular materials in industry.

The Controlled Materials Plan, announced in November 1942, operates under a system of claimant agencies. These claimant agencies are each a government unit and include, among others, the Army Air Force, which is represented by the Aircraft Scheduling Unit. These agencies are war procurement agencies and are advised of the needs for materials from their various prime contractors. Materials are allotted by the Requirements Committee, to each of the Claimant Agencies, and each Claimant Agency has the primary responsibility for each program of allotment. (C. C. H. War Law Serv., Par. 33,023.)

Steel, copper and aluminum were the first three materials to come within the CMP. Whenever materials come under CMP delivery can be made by a person in possession of the materials without a preference rating. (C.C.H. War Law Serv., Par. 33,031.)

Under PRP each purchaser sent to the proper government office one or more copies of his purchase order containing an appropriate allocation classification and purchaser's symbol. Under CMP the needs of consumers of materials is ascertained through a system of Bills of Materials. CMP abolished allocation classifications and inaugurated a system of allotment numbers instead.

APPENDIX F.

PRIORITIES REGULATION 13.

PART 944—REGULATIONS APPLICABLE TO THE OPERATION OF THE PRIORITIES SYSTEM.

[Priorities Regulation 13 as Amended to September
23, 1942]

Special Sales of Idle or Frozen Materials.

§944.34. *Priorities Regulation 13*¹—(a) *Purpose*. The purpose of this regulation is to provide uniform rules governing special sales of idle or excess materials by persons who are not regularly engaged in the business of selling such materials, including distress and liquidation sales and sales by persons who, by reason of the effect of priority orders or for other reasons, cannot use such materials in the regular course of their business. This regulation does not authorize receipt or use of any material by any person in violation of any inventory, quota or use restrictions imposed by any order or regulation.

(b) *Definitions*: For the purposes of this regulation:

(1) "Sale" of a material includes any public or private sale, auction sale, sale upon foreclosure of any lien or mortgage, or delivery of such material in exchange for money or for any other material and the sale of any warehouse receipt, bill of lading or other document evidencing an interest in such material, but does not include the pledge or mortgage or other creation of any lien upon such material or the transfer of possession of such material without any transfer of title.

¹7 F.R. 5167, 5604.

(2) "Special sale" means any sale except that:

(i) A sale of any material by any person who regularly in the course of his business sells such material in the same form is not a special sale. For the purpose of this subparagraph, the following classes of sales shall not be deemed to be made by a person who regularly sells material in the course of his business; a sale by any receiver trustee in bankruptcy, public official or other person acting in a fiduciary or representative capacity (except when made in the course of carrying on the business of an insolvent or bankrupt person or other person whose business is in the hands of such fiduciary or representatives), or any other sale made in the course of liquidating a business or the assets of a business;

(ii) A sale of any material which is being rationed at the retail level by the Office of Price Administration or any other governmental agency is not a special sale;

(iii) A sale of any tool, machinery, or other assembled commercial, industrial, production, agricultural, or household equipment is not a special sale;

(iv) A sale of material which is in the form in which it is used by ultimate consumers thereof and which does not require, in order to be so used, to be further processed or assembled with other materials or made part of a building or other structure is not a special sale;

(v) A sale of foodstuffs, medicines, and other materials for internal human consumption is not a special sale.

(3) "Material" means any commodity, equipment, accessory, part, assembly or product of any kind.

(4) "War materials" means any material consisting in whole or in substantial part of one or more materials listed in Schedule A attached.

(5) "Person" means any individual, partnership, association, business trust, corporation, governmental corporation or agency, or any organized group of persons, whether incorporated or not.

(6) "Single lot" of material means all material of the same size and specification at the same location.

(7) "Director" means the Director General for Operations or the Director of Industry Operations of the War Production Board or the Director of Priorities of the Office of Production Management.

(c) *Permitted special sales.* (1) Subject to paragraph (e) of this regulation, any person may make a special sale of any material other than a war material without restriction.

(2) Subject to paragraph (e) of this regulation, any person may make a special sale of any war material if the sale falls within one of the following categories, and no person may make any special sale of any war material if such sale does not fall within one of the following categories:

(i) A sale to any of the following governmental departments or agencies or to any person buying for the account of such departments or agencies: Maritime Commission, Navy Department, War Department, Board of Economic Warfare, Commodity Credit Corporation, Defense Supplies Corporation, Metals Reserve Company, Rubber Reserve Company and any other corporation organized under section 5 (d) of the Reconstruction Finance Corporation Act as amended; or

(ii) A sale pursuant to a specific authorization of the Director naming the seller and identifying the particular sale to be made; or

(iii) A sale of a single lot of war material (other than a war material listed in Schedule B attached) at an aggregate price of less than \$100. This exception does not permit the dividing of a single lot having a value of over \$100 into smaller lots and selling such smaller lots for less than \$100 under this subparagraph.

(iv) A sale to any person falling within a class indicated on Schedule A attached as being a class to whom the particular war material may be sold: *Provided*, That when any alloy, compound, mixture, or product is not listed as such on Schedule A and contains a significant amount of more than one war material, the sale shall be made only to a person to whom all such contained war materials may be sold. A sale of a plated item shall be governed by the basic material, disregarding the plating.

(3) In addition to the provisions of paragraph (c) (2) above, any person may, subject to paragraph (e) of this regulation, make a special sale of any war material to another person engaged in the same business as the seller if an order or other action of the Director applicable generally to persons engaged in such business expressly permits such a sale.

(d) *Intra-company transfers.* Any person may transfer, otherwise than by sale, any material to another department, branch division or section of his business or to a wholly owned subsidiary or affiliate or to another person under common ownership or control, provided such transfer would be a special sale if made for a consideration and such special sale would have been permitted under this regulation.

(e) *Effect on other orders and regulations.* (1) Any sale which is not a special sale shall remain subject to the provisions of all applicable orders and regulations.

(2) The provisions of this regulation shall control all special sales although inconsistent with any order or regulation of the Director heretofore issued and although inconsistent with any order or regulation of the Director hereafter issued unless such order or regulation expressly provides to the contrary. Notwithstanding any provision of any such order or regulation which permits such sale, no special sale shall be made if forbidden by the provisions of this regulation; and any special sale permitted by the provisions of this regulation may be made, and deliveries thereunder accepted by the buyer, despite any provision of any such order or regulation forbidding the same except that:

(i) Nothing in this regulation shall affect any provision contained in any order or regulation of the Director which imposes any quota or other limitation on the amount any buyer may purchase, receive or produce, or which imposes any limitations on the amount of inventory of any person or any restrictions upon the use of any material; and

(ii) This regulation shall not affect any provision of any applicable order or regulation of the Director requiring a buyer to make any reports or to furnish any information in connection with a purchase; and

(iii) No seller shall make any special sale if he knows or has reason to believe that the purchase or acceptance or delivery by the buyer would violate any inventory or quota restrictions imposed on the buyer by any order or regulation or that the buyer is acquiring the material for a use which would be in violation of any order or regulation.

(f) *Records.* Any person making any special sale must maintain at his regular place of business all documents,

including purchase orders and preference rating orders and certificates, upon which he relies as entitling him to make such sale. Such records shall be kept segregated and available for inspection by representatives of the War Production Board, or filed in such manner that they can be readily segregated and made available for such inspection.

(P. D. Reg. 1, as amended, 6 F.R. 6680; W.P.B. Reg. 1, 7 F.R. 561; E.O. 9024, 7 F.R. 329; E.O. 9040, 7 F.R. 527; E.O. 9125, 7 F.R. 2719; sec. 2 (a), Pub. Law 671, 76th Cong., as amended by Pub. Laws 89 and 507, 77th Cong.)

Issued this 23d day of September, 1942.

ERNEST KANZLER,
Director General for Operations.

SCHEDULE A¹

Explanatory Note: This schedule relates only to special sales made under paragraph (c) (2) (iv.) of this regulation. Any purchaser of material through a special sale must comply with all inventory, quota, and use restrictions imposed by all other orders and regulations.

When an alloyed material, or a physically or chemically compounded material, is shown in this table, the conditions that govern the sale of the alloyed or compounded material are those shown for the alloy or compound and not those shown for the constituent elements or parts. For example, the conditions under which stain-

¹Schedule A as it appeared on September 24, 1942 issue of the Federal Register is omitted. In lieu thereof Amendment No. 1 to Schedule A as published in Federal Register November 18, 1942 is reprinted as Appendix F, continued.

less steel may be sold are those shown for the war material "Stainless Steel" and not those shown for "Chromium" or "Nickel" or "Steel". When any alloy, compound, mixture, or product is not listed as such on Schedule A and contains a significant amount of more than one war material, the sale shall be made only to a person to whom all such contained war materials may be sold, Plated items are governed by the basic material, disregarding the plating.

The word "No" appearing in any column in this schedule means that a holder may not sell the particular war material to any person in the class to which that column applies unless the sale is otherwise permitted by this regulation.

The letters "PR" means Preference Rating, and wherever they appear in any column, means that the holder may sell the particular war material to any person in the class to which that column applies, but *only* provided that such person places with the holder an order for the material bearing a duly applied or extended preference rating equal to or higher than the rating shown immediately after the letters "PR". For example, "PR A-1-k", which appears opposite the war material "Nickel" in the column headed "Users permitted to buy for an authorized use" means that the holder may sell to any user who places an order for a product containing nickel if that order bears a duly applied or extended preference rating of A-1-k or higher.

The letters "W. O. P." means "Without Preference Rating" and wherever they appear in any column mean that the holder may sell the particular material to any person in the class to which that column applies without any preference rating from the buyer.

APPENDIX F, Continued.

Amendment to Priorities Regulation 13.

Federal Register, Wednesday, November 18, 1942
TITLE 32—NATIONAL DEFENSE
Chapter IX—War Production Board

Subchapter B—Director General for Operations

PART 944—REGULATIONS APPLICABLE TO THE OPERATION OF THE PRIORITIES SYSTEM

[Amendment 1 to Schedule A to Priorities Regulation 13 as Amended to Sept. 23, 1942]

Schedule A¹ attached to Priorities Regulation No. 13 (§944.34) is hereby amended with respect to the materials listed below as follows:

AMENDMENT NO. 1 TO SCHEDULE A

Classes of buyers to whom special sales of war materials
may be made in accordance with this schedule, subject
to paragraph (e) (2) of this regulation

Persons who pro- duce ma- terial in the form in which it was purchased by holder	Users per- mitted to buy for an authorized use	Reproces- sors who are authorized to buy	Whole- sale deal- ers who sell the material in the form held by holder	Scrap dealers who are author- ized to buy
--	--	---	--	--

War Material	(1)	(2)	(3)	(4)	(5)	(6)	Remarks	(7)
Copper:								
Copper ingots and refinery shapes.	W.O.P.	No.	X	W.O.P.*	No.		*Only to persons holding allocation certificates or specific authorization to buy.	
Copper base alloy ingots (40% or more copper by weight).	W.O.P.	No.	X	W.O.P.*	No.			
Brass and wire mill products.	W.O.P.	PR AA-5	X	W.O.P.*	No.		This note applies only to places where asterisk appears.	
Insulated wire	W.O.P.	PR AA-5	X	W.O.P.	No.			
Copper and copper base alloy foundry products.	W.O.P.	PR AA-5	X	W.O.P.*	No.			
Brass mill scrap	W.O.P.**	No.	X	X	W.O.P.		**Only to brass mills.	
Other scrap	W.O.P.*	No.	X	X	W.O.P.			
Copper chemicals (see chemicals).								

Steels:³

Rails and track accessories.*	No.	No.	No.	No.	No.	*See L-88.
Tin plate, terne plate and tin mill black plate.*	W.O.P.	PRA-10	X	No.	No.	*Subject to limitations of M-21-e.
All other carbon and alloy steels.	W.O.P.	PRAA-5	PRAA-5	PRAA-5	No.	
Tin and terne plate scrap	W.O.P.	No.	W.O.P.	X	W.O.P.	
Other carbon steel scrap	W.O.P.	W.O.P.	W.O.P.	X	W.O.P.	
Alloy steel scrap	W.O.P.	No.	No.	X	W.O.P.	

Terne plate (see Steels).

Terne plate scrap (see Steels).

Tin mill black plate (see Steels).

Tin plate (see Steels).

Tin plate scrap (see Steels).

Cotton, American extra staple.* W.O.P. W.O.P. X W.O.P. No. *As defined in M-197. Use certification required.

Cotton, Egyptian* W.O.P. W.O.P. X W.O.P. No. *As defined in M-117. Use certification required.

Cottonseed, XSP W.O.P. W.O.P. X W.O.P. W.O.P.

¹In the case of all sales made under this regulation of copper or copper base alloy items which have previously been reported to War Production Board, Care Copper Recovery Corporation, 200 Madison Avenue, New York, New York, the seller must send a copy of the invoice to that address.

²In the case of all sales made under this regulation of steel or steel base alloy items which have previously been reported to War Production Board, Care Steel Recovery Corporation, 5835 Baum Boulevard, Pittsburgh, Pennsylvania, the seller must send a copy of the invoice to that address.

[F.R. Doc. 42-12012; Filed, November 17, 1942; 10:45 a.m.]

(P.D. Reg. 1, as amended, 6 F.R. 6680; W.P.B. Reg. 1, 7 F.R. 561; E.O. 9024; 7 F.R. 329; E.O. 9040, 7 F.R. 527; E.O. 9125, 7 F.R. 2719; sec. 2 (a), Pub. Law 671, 76th Cong., as amended by Pub. Laws 89 and 507, 77th Cong.)

Issued this 17th day of November 1942.

ERNEST KANZLER,
Director General for Operations.

APPENDIX G.

Discussions of Manifest Error and Injustice of Court of Appeals Opinion In This Case.

(NOTE: There is here discussed the opinion of the Circuit Court of Appeals which is sought to be reviewed. Certain manifest errors appear therein in so far as the decision of this case is concerned. To permit a judgment of imprisonment and the fine assessed to stand against petitioner based on the reasons assigned in the opinion, would constitute a form of judicial injustice. There is not presented here the law and factual arguments presented to the Circuit Court of Appeals. This was done at length in briefs filed upon the appeal and in connection with the rehearing. There is no attempt here to argue all of the points raised which were made to the Circuit Court. Our petition here is premised upon the constitutional grounds which have been presented in the body of the petition. It is clear, however, that the only rationalization which can be made of the Circuit Court of Appeals opinion is: That court too was unable to understand and properly apply the manifold orders and regulations of the War Production Board to the facts of the instant case — yet appellant Stein was convicted of a crime and is subject to a judgment of imprisonment and a heavy fine by reason of his inability to know and understand and obey the same orders and regulations.)

A. WITH RESPECT TO THE REGULATIONS.

(1) Effect of Revocation of Priorities Regulation No. 10 upon General Preference Order M-9-a.

The Circuit Court asserts that it is appellant's position that the whole of M-9-a was impliedly repealed by the revocation of Priorities Regulation No. 10. While this is a position of the petitioner, it is not the only position of petitioner. In fact, the petitioner more strongly urges that the revocation of PR 10 made M-9-a uncertain and ambiguous. Leaving aside whether the revocation of PR 10 constituted a repeal of M-9-a, the revocation did make M-9-a uncertain and ambiguous so that M-9-a could not support a criminal conviction. The *uncertainty* engendered in M-9-a by the revocation of PR 10 was not mentioned or considered by the Second Opinion.

(2) The Class of Persons problem.

The Second Opinion discusses Section 933.2(b)(1) of General Preference Order M-9-a and holds that Stein could not be a dealer within the meaning of that section because this prosecution did not involve his sale of "copper." The Opinion, however, does not compare section (b)(1) of M-9-a with section (c)(2) of M-9-a with a view to determining the class of persons governed. We contend and have contended that it is perhaps impossible to determine the class of persons regulated by these two sections. In section (b)(1) the word "dealer" is used to describe the class of persons governed. Dealer is defined to mean "one who receives physical delivery of copper and sells or holds the same for sale without change in form." Whereas, in section (c)(2) the class of persons is described by the words "Industrial supplier, mill supplier, plumbing supplier, or other persons engaged in

the business of distributing brass mill or wire mill products to industry or trade." The ambiguity arises because the copper wire made the subject of this prosecution was a product which Stein had not theretofore been engaged in the business of selling or distributing.

We urge that Stein was not a "person engaged in the business of distributing brass mill or wire mill products to industry or trade," because the distribution of brass mill or wire mill products was not the business in which he was engaged. If section (c)(2) of M-9-a were meant to govern one who merely sells what he receives, then M-9-a would have used the word "dealer" to include wire mill products. There must have been some reason why the War Production Board used the word "dealer" to describe the activities coming under section (b)(1) and did not use the word "dealer" to describe the activities coming under section (c)(2). The Second Opinion fails to explain the difference between use of the word "dealer" in section (b)(1) and the use of words other than "dealer" in section (c)(2).

(3) Application of Priorities Regulation No. 13.

Priorities Regulation No. 13 governs special sales. The Second Opinion is correct in so far as it emphasizes that PR 13 governs *special* sales.

A special sale is a sale by a person "not regularly engaged in the business of selling *such* materials." Insulated copper wire is one of the materials regulated by PR 13. The Second Opinion fails to give due credence to the word "such" as applied in this prosecution. The word "such" would mean insulated copper wire, so that a special sale would be a sale by a person "not regularly engaged in the business of selling" insulated copper wire.

Stein could well be precisely the kind of person who could make a special sale of insulated copper wire because there was no evidence in the record that he was a person regularly engaged in the business of selling insulated copper wire. In fact, the record is to the contrary and shows that Stein had never before purchased or handled insulated copper wire, and there is no evidence in the record that after he disposed of the insulated copper wire which he purchased from Lockheed, he ever again purchased or sold that commodity.

Special Sales under PR 13 could be made in certain circumstances without any priority. At the time the sales were made by Stein, the circumstances were in two classes.

One, sales made to "wholesale dealers who sell the material in the form held by holder." The largest sale made by Stein for which he was prosecuted, was that contained in Count 7 of the Amended Information [R. 18]. This was the delivery of 100,000 ft. of copper wire to Troy Radio & Television Company, which in turn sold the material in the same form to Seattle Radio Supply, Inc. [R. 104, 252]. Therefore, the sale by Stein to Troy Radio & Television Company was a sale to a wholesale dealer which sold the material to another in the same form held by holder. Accordingly, that sale comes within that portion of PR 13 wherein a Special Sale can be made without any priority.

Two, sales in single lots of less than \$100.00 may be made without priority under PR 13.

The War Production Board Release No. WPB-1489, issued July 7, 1942 (C.C.H., War Law Serv., Par. 3092.10) read in part:

“5. Q. To whom can ‘Special Sales’ of ‘War Materials’ be made? A. (d) in individual lots of an aggregate price of less than \$100.00.”

Three of the Counts of the Amended Information were, as the evidence shows, for sales of less than \$100.00. [As to Count V, see Exhibit 16, the price of \$60.00; as to Count VI, see Exhibit 17, the price of \$60.00; as to Count IX, see R. 107, the price of \$77.25.]

(4) Application of Priorities Regulation No. 1.

The Second Opinion dismisses consideration of PR 1 by quoting from PR 1 the language that PR 1 applies only in the event that another regulation is not applicable. But the Second Opinion overlooks the ambiguity present in M-9-a. We urge that where other regulations are uncertain in their application, then it is reasonable for a business man to assume that he is governed by PR 1. That regulation read in part as follows:

“‘Compulsory acceptance of defense and other rated orders. Defense Orders for any material and all other purchase orders bearing preference ratings, including both A and B ratings (hereinafter called ‘other rated orders’) must be accepted and filled in preference to any other contracts or purchase orders for such material, . . .’ (Sec. 944.2, Priorities Regulation No. 1, 6 FR 6681, December 24, 1941.)”

The evidence on some of the Counts reveals that the defendant Stein sold to purchasers who were operating under a preference rating of A-10, or were purchasing as a Defense Order [As to Count II, R. 99; as to Count III, R. 100; as to Count V, R. 101; as to Count VI, R. 101; as to Count XII, R. 108], and hence may be compulsory orders under Priorities Regulation No. 1."

B. WITH RESPECT TO THE JURY INSTRUCTIONS.

The Second Opinion is inconsistent within itself. The charge instructed the jury that the delivery of a wire mill product should not be made unless the three elements of appropriate allocation classification, purchaser's symbol, and preference rating of AA-5 or higher, are endorsed on the purchase order. [R. 277.]

The Second Opinion noted that PR 10 which prescribed the appropriate allocation classification and purchaser's symbol, was revoked prior to the time when any of the deliveries of insulated copper wire involved in the prosecution occurred.

The Second Opinion makes the following contradictory statements:

"The court instructed the jury as to section 933.2(c)(2) applicable to the case without noticing the change made by the elimination of the regulation."

"The Judge correctly instructed in regard to law applying to all of the counts excepting . . ."
Counts 15, 16 and 17.

We urge that the trial court's instruction to the jury was not correct on any of the counts because the instruction failed to notice "the change made by the elimination of the regulation," Priorities Regulation No. 10.

The Second Opinion asserts that the failure to note the change made by PR 10 could not possibly have been prejudicial to appellant. We urge that the failure to note the change in PR 10 was constitutionally hurtful prejudice to Stein because, first, the jury charge informed the jury as to elements of a crime not present in the law, and, second, it clouded the issue of wilfulness since it may well make a substantial difference in determining criminal intent whether an alleged violator failed to perform in three respects or only in one.

C. THE INFORMATION.

The Second Opinion failed to discuss in any respect whether, in the light of the revocation of PR 10, the Amended Information was competent to support a conviction. In each of the Counts of the Amended Information, Stein was charged with making deliveries of insulated copper wire and that each of the deliveries was not made "*to fill an order bearing the appropriate allocation classification and purchaser's symbol* and bearing a preference rating of AA-5 or higher . . ." In view of the revocation of PR 10, there was no legal existence to "appropriate allocation classifications" or "purchasers' symbols" during any of the times when deliveries of insulated copper wire were made by Stein.

D. THE PROOF OF WILFULNESS.

The Second Opinion errs in failing to hold that affirmative proof of guilty intent is required to sustain a criminal conviction for violation of the Second War Powers Act. The Second Opinion holds that because there was no compelling inference from the testimony that Stein did not wilfully violate the law, he is therefore guilty.

But the law with respect to wilfulness is more aptly stated in the First Opinion—to prove a wilful violation of a WPB order there must be affirmative proof not only that the defendant performed the prohibited act but that he performed it wilfully. The Second Opinion nowhere asserts that Stein did the prohibited acts deliberately and perversely.

It is important to note that when the Circuit Court of Appeals properly stated the law with respect to the proof of wilfulness, as it did in the First Opinion, it found that the judgment of conviction should be reversed.

E. INCONSISTENT VERDICTS.

While the majority opinion in *Dunn v. U. S.*, 284 U. S. 390, holds that consistency in the verdict is not necessary, we urge that a re-examination of the holding in the *Dunn* case is appropriate. In the instant case, the single issue of fact presented to the jury was the issue of the defendant's wilfulness. The delivery of insulated copper wire was, in each of the Counts, either stipulated to by Stein or not put in issue.

In the *Dunn* case, the petitioner was indicted in three Counts for different types of offenses. These offenses were "first, for maintaining a common nuisance by keeping for sale at a specified place intoxicating liquor, second, for unlawful possession of intoxicating liquor, and third, for the unlawful sale of such liquor." (p. 391.)

The jury acquitted the defendant on the second and third counts and found him guilty on the first. There

was not before the jury in the Dunn case a single issue as to the three counts. There is in the instant case, however, a single issue of fact, that of wilfulness. The deliveries by Stein of insulated copper wire were in each Count either stipulated or not contested.

Mr. Justice Butler wrote a lengthy dissenting opinion in the Dunn case. He stated the rule to be "that when, upon an indictment charging the same offense in different counts, the jury acquits as to one and convicts on the other the defendant is entitled to a new trial." (p. 406.)

We urge that the Dunn case should be reconsidered and the rule respecting inconsistent verdicts modified to hold that where there is a single issue of fact in an indictment or information charging the same offenses in different counts and the jury acquits as to one and convicts as to the other counts, then the defendant should be entitled to a new trial.

Service of the within and receipt of a copy
thereof is hereby admitted this.....day of
March, A. D. 1946





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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 976

JACOB R. STEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 345-364) is not yet reported.¹

JURISDICTION

The judgment of the circuit court of appeals was entered February 18, 1946 (R. 344-345). The petition for a writ of certiorari was filed March 20, 1946. The jurisdiction of this Court is in-

¹ The first opinion of the circuit court of appeals, which was withdrawn (R. 343-344), was not reported and is not included in the Record. It is reproduced in Appendix A of the petition for a writ of certiorari.

voked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

Petitioner admits that in selling a critical war material (insulated copper wire) he filled orders not bearing an appropriate allocation classification, a purchaser's symbol, or a preference rating of AA-5 or higher, as charged in each of the 11 counts of the information as to which the judgment was affirmed on appeal. The questions presented are:

1. Whether his conviction is void by reason of the fact that only the requirement for a preference rating remained in effect at the times the sales were made.

2. Whether the regulations involved are too vague, and indefinite to support a criminal prosecution and conviction.

3. Whether there was evidence to support the jury's finding that petitioner wilfully violated the regulations.

4. Whether, in view of the single factual issue of wilfulness submitted to the jury, the verdicts of guilty on counts 2, 3, 5 to 10, inclusive, 12, 13, and 14 were fatally inconsistent with the verdict of not guilty on count 1.

STATUTE AND REGULATIONS INVOLVED

The pertinent portions of the Second War Powers Act and of the regulations promulgated thereunder by the War Production Board are set forth in the Appendix, *infra*, pp. 26-30.

STATEMENT

After a trial by jury in the United States District Court for the Southern District of California, petitioner was convicted on counts 2, 3, 5 to 10, inclusive, and 12 to 17, inclusive (R. 33), of a 17 count information (R. 14-27)² charging violations of the Second War Powers Act of 1942 and regulations issued pursuant thereto, in that, during the period from December 3, 1942, to March 16, 1943, he sold copper wire, a critical material, to purchasers not furnishing orders "bearing the appropriate allocation classification and purchaser's symbol and bearing a preference rating of AA-5 or higher, or bearing any allocation classification, purchaser's symbol, or preference rating whatsoever." Petitioner was sentenced to imprisonment for one year on each of these counts, to run concurrently, and to pay a fine of \$25,000 to be distributed equally among such counts (R. 37). On appeal to the Circuit Court of Appeals for the Ninth Circuit, petitioner's conviction was reversed as to counts 15,

² Counts 4 and 11 were dismissed on motion by the Government before trial (R. 283; Pet. 2), and the jury found petitioner not guilty on count 1 (R. 33).

16, and 17,³ and affirmed as to all others (R. 365).

It is admitted by petitioner that the sales, as charged in the counts upon which he was convicted, were made by him "to purchasers without procuring from said purchasers an order bearing the allocation classification, purchaser's symbol and preference rating of AA-5 or higher" and that "The *sole issue* to which the evidence was directed concerned the alleged 'willfulness' of" petitioner in making the prohibited sales (Pet. 10). The proof of that issue may be summarized as follows:

In September 1942, petitioner, who was organizer and general manager of Western Sales & Supply Company (R. 206, 243), purchased from Lockheed Aircraft Corporation a quantity of material excess to Lockheed's requirements, including, *inter alia*, about 668,000 feet of insulated copper wire (R. 70, 71) which was no longer needed because of an engineering change in an airplane being produced by Lockheed at that time (R. 73, 75).⁴ For about a month prior to petitioner's purchase of this wire, he and Lockheed's materials disposal department manager, Taylor (R. 69-70, 172, 210, 211), admittedly discussed

³ Reversal of these counts was predicated on the trial court's failure to instruct the jury as to the applicable regulation involved, which had been materially changed before the sales charged therein were made (R. 350-351).

⁴ There is no evidence that this wire was unusable by others engaged in war production.

"priority regulations" (R. 211, 172), "governmental instructions and regulations on sales" (R. 75, 210), the nature and character of the materials involved in the transaction (R. 210-211, 172-173), and the fact that the War Production Board had placed "certain restrictions" upon petitioner and would not permit him to purchase certain types of materials, including some of the types offered for sale to him by Lockheed (R. 210, 211, 174, 182). Although the Western Procurement Division, Army Air Forces, had released all of these materials for sale by Lockheed (R. 74), petitioner could not and did not purchase the latter types (R. 210-211, 174, 182) because of the restriction upon him, because "a lot of items were subject to priority regulations" (R. 211, 182), and apparently also in part because Lockheed had on a prior occasion experienced certain difficulties with reference to the disposal of such surplus materials (R. 172-173, 210-211). Before petitioner was permitted by Lockheed to make the purchase of the items which he ultimately bought, including the copper wire, Taylor, "as a representative of Lockheed Aircraft Corporation requested that we stipulate that the materials should be sold [by petitioner] in accordance with the existing rules and regulations of the War Production Board" (R. 70, 182), such stipulation to be included in petitioner's purchase order for the materials. Lockheed's "priorities man" was then

informed of the proposed contents of the purchase order and, in view of petitioner's agreement to require compliance with WPB regulations in reselling the materials, approved their sale by Lockheed to petitioner (R. 173). Thereafter, on September 22, 1942, petitioner, complying with this condition (R. 71, 174, 212, 242), sent to Lockheed a purchase order for the materials, in which he had inserted the statement (R. 300):

It is also understood that we as buyers, will not under any consideration release any of this material to anyone not in a position to furnish proper priorities or conformance with all rules and regulations as prescribed by the War Production Board.

In October 1942, petitioner, who had no WPB priority for the purpose (R. 127-129), sought to purchase from Lockheed a quantity of steel (R. 234-235) which he intended to resell to others who held the necessary WPB priorities (R. 235). Petitioner discussed his right to purchase this steel with Major Vockrodt, assistant chief of production, Western Procurement Division, AAF (R. 125). He informed Vockrodt that he "had received the approval of the War Production Board, had filed the particular forms with Lockheed as prescribed by the regulations, and, as he understood it, it was mandatory upon Lockheed to furnish the steel to him" (R. 203, 247). Vockrodt replied that "this was aircraft material, and it was the function of the Army Air Force to keep

those materials under their jurisdiction until they decided to release them; that he was issuing no clearances to anyone for aircraft purchase materials, and particularly not to jobbers * * * that * * * he could see no place in the industry or in the business for jobbers" (R. 203). Since petitioner had no WPB priority (R. 127-128, 129), Vockrodt informed him that the AAF would not authorize the release of this steel to him (R. 127, 128).

Copper wire was at no time discussed between Vockrodt and petitioner (R. 125-126, 245).

During the same month, October 1942, one Tooker,^{*} associate production supervisor of the production engineering section of the Western Procurement Division, AAF (R. 142, 157), in passing petitioner's Western Sales & Supply Company, noticed a large quantity of steel being transported into the company's yard (R. 144). The duty of Tooker and his section was "to increase the production of all aircraft parts being manufactured by subcontractors within our jurisdiction and to expedite those parts to the prime contractors, * * * inspection, plant protection, metals control" (R. 143), to "determine the end use" (R. 144) of materials considered to be "critical," and to route them "to the end use, AA-1, which is aircraft, if possible and if needed"

^{*} Tooker and his successor in office, Chapman, testified as witnesses for petitioner.

(R. 151, 152-153; see also R. 127, 135, 167-168). Tooker therefore went into Western Sales & Supply to determine whether it was routing materials considered by the AAF to be strategic and critical in accordance with prescribed WPB procedure in regard to priority (R. 144, 151, 152-153). Tooker and petitioner discussed this question on various occasions, during one of which petitioner gave Tooker an inventory report of the materials in stock (R. 144-145, 159). Thereafter Tooker specifically informed petitioner that certain of the articles listed were "urgently required," and that petitioner was not to sell them until Tooker's office "gave him a release" (R. 145). Petitioner agreed to cooperate (R. 146). Tooker also informed petitioner that the latter's inventory was too large for Tooker to handle, that he, Tooker, would write a letter to petitioner "freezing" those materials which to Tooker's knowledge either were required or might be required for aircraft use, whose urgency he would determine; that as far as the balance of petitioner's inventory was concerned, petitioner would have to be guided by the Airplane Designers Handbook with reference to the definition of the word "strategic"; that one Smith, materials control coordinator for the Western Procurement Division (R. 150, 151, 154), had the handbook and "could very easily tell" petitioner "whether or not any sales which he made were within the bounds of our freezing order" (R. 153-154). Petitioner asked Tooker

whether "there weren't some [AAF] regulations which would cover the materials for resale from Lockheed." Tooker replied in the negative. (R. 155, 159.)

On November 14, 1942, a further discussion was had between petitioner and Tooker relative to strategic and critical materials (R. 81, 152). Tooker informed petitioner that before the latter could sell strategic materials to vendees having priorities lower than AA-1, it would be necessary for him to obtain a release from the AAF (R. 152-153, 165-166, 170-171). Petitioner mentioned that he had several purchase orders bearing priority rating of A-10. Tooker replied that it was the desire of the AAF to eliminate such orders in favor of higher priorities. (R. 166.)

Thereafter, Tooker prepared a letter, which was sent to petitioner on November 16, 1942, over the signature of Major Zwick, the AAF resident representative (R. 80-82, 148, 152), restating the substance of the directions given to petitioner by Tooker. Petitioner was advised in part that his company was "required to obtain release from this office in writing for sale of all strategic materials, which purchases from vendee are assigned priorities lower than AA-1 * * *. The term 'strategic materials' is to be construed as those materials listed in the Airplane Designers Handbook as 'critical'. * * * Release may be obtained by calling or writing this office stating name and address of buyer, article, name and

part number (if assigned by manufacturer), and priority assigned to vendee's purchase order." (R. 81, 152.)

On or about November 27, 1942, Sullivan, district manager of the Redistribution Division of the WPB (R. 114), asked petitioner whether, "since he proposed to buy surplus inventories * * * he had filed the necessary forms to authorize him to deal in allocated materials under war production orders" (R. 114, 115, 123-125). Petitioner replied that he had filed the forms but that "the forms had been denied" (R. 114-115, 123-125). Sullivan advised him of his right to appeal from the denial, and petitioner stated that he would appeal (R. 114). Sullivan then requested him to refrain from dealing in "allocated materials," including "steel, copper and aluminum, and other surplus materials," until he had won his appeal (R. 114-115, 123-124). No appeal, however, was ever filed by petitioner (R. 115, 240. See also R. 121).

Petitioner next sought to persuade Taylor at Lockheed to release the steel to him, but Taylor refused to do so, since the AAF would not authorize its release (R. 178-179, 237-238). Petitioner thereupon informed Taylor that it was "mandatory" for Lockheed to make the sale to him, or Lockheed "would be in violation of compliance" with a WPB order (R. 179); that he, petitioner, had discussed the matter with the WPB "and had permission of the War Produc-

tion Board" (R. 182). Taylor nevertheless refused to transfer the steel (R. 179, 237).

During this period petitioner also spoke to Daniels, WPB materials redistribution analyst, respecting his right to purchase (R. 185) (but never concerning his right to sell) various materials (R. 186). Daniels, a defense witness, testified unequivocally that "There was no discussion between me and Mr. Stein as to the matter of getting anyone's permission or permit to sell this surplus material" (R. 186).⁶ Daniels at no time discussed any copper wire transactions with petitioner (R. 188).

Meanwhile, Tooker, and later Chapman, materials expediter of the AAF (R. 131-132), had been assigned the function of granting releases of the type mentioned in Zwick's November 16 letter (R. 133-134, 135, 156-157). It was part of their duties in this connection "to make sure" that WPB requirements were complied with in each case where a release was sought (R. 134), and both Tooker and Chapman were specifically

⁶ Petitioner testified that following Vockrodt's refusal to permit the release of the steel to him, he saw Taylor at Lockheed, who refused to release the steel until the AAF had authorized its release (R. 237); that he then spoke to Daniels who, according to petitioner, instructed him in the preparation of a WPB order "P. D. 83" which would make mandatory the release of the steel (R. 238). Daniels did not testify as to any such transaction or form, and no such form was offered in evidence. In fact, there does not appear to be any form issued by the WPB making mandatory the transfer of any items.

informed by Major Zwick that WPB regulations "had to be complied with" and could not be waived (R. 134; see also R. 140-141, 166). On several occasions thereafter petitioner telephoned to Tooker, and possibly Chapman, for permission to sell materials considered strategic "without a written release" as required by Zwick's letter (R. 147, 150, 152).⁷ In some instances oral permission was granted, while in others it was denied (R. 147, 150, 152). On no occasion did petitioner, as he claims (R. 216-217, 248), seek or obtain permission to sell to vendees not having the required WPB priorities (R. 76, 126, 131, 142, 158, 161, 163, 164, 166). And on no occasion did petitioner seek or obtain either from Zwick or Tooker, as he claims (R. 248), a release or permission to sell copper wire (R. 131, 149, 160, 161, 170), nor did he at any time even discuss with Zwick or Tooker copper wire or its disposal (R. 132, 149, 159-160. See also R. 126).

Beginning on December 3, 1942, and on twenty-six subsequent occasions prior to March 18, 1943, the period covered by the information, as well as on numerous occasions thereafter, petitioner sold copper wire to purchasers who did not have the necessary WPB priority (R. 96-114, 242, 303-305, 326-330). Every such sale without priority was

⁷ Petitioner admits that the only writing relating to copper wire received by him was the letter of November 16, 1942, from Zwick (R. 245).

made upon his express approval (R. 95, 192-194, 197).

On or about March 17, 1943, Burdge, an investigator for the WPB, called upon petitioner to discuss his sales of copper wire without compliance with WPB priority regulations (R. 77-78). When Burdge informed petitioner that the purpose of his visit was to ascertain whether petitioner had been selling copper wire without receiving preference rated orders, petitioner stated, "We do not feel very kindly to the War Production Board, and we have decided that if they will let us alone, we will let them alone" (R. 78). Burdge advised petitioner that "persons who undertake to engage in business selling critical materials" had to "observe War Production Board rules and regulations in their sales" (R. 78). During this conversation, petitioner admitted to Burdge that he was selling copper wire without priorities, asserting that he "had clearance from the Air Corps" to make the sales, showing to Burdge Zwick's letter of November 16 (R. 80, 84-85, 244, 228). Burdge read the letter, and then stated that he could not see where petitioner "got any authorization from Major Zwick's letter to sell copper wire without a preference rated order" (R. 88). Petitioner did not tell Burdge at any time that he had obtained authority from either Tooker or Chapman to sell the wire without complying with WPB regulations (R. 88), and did not state, as counsel for

petitioner sought to bring out on cross-examination of Burdge, that Chapman had told him that "the permission of the Air Force was all that he needed and that he did not require any War Production Board permission" (R. 88).

On March 18, Burdge, having been given a record of copper wire sales by petitioner (R. 79-80, 303), was asked by either petitioner or his brother whether "it was all right for them to go ahead and sell this copper wire without preference rated orders * * *." Burdge replied that he was only an investigator for the compliance branch of the WPB, and that petitioner should seek information from the priorities division of the WPB as to rights and methods of operation. (R. 86-87.) Following Burdge's visits in March, no change was made by petitioner or his organization in the manner of selling wire (R. 234).

On or about July 7, 1943, Burdge again inspected petitioner's records. Upon noticing that there were a number of invoices covering sales of copper wire subsequent to his previous conversations with petitioner, Burdge questioned petitioner, who replied that he was making such sales. Burdge then stated that he "was amazed to see" that petitioner "was continuing to sell copper wire without receiving preference rated orders * * *," and stated that his previous inquiry should have put petitioner "on notice

that preference rated orders are required for the purchase of that copper wire." (R. 83, 89, 90, 91.) Petitioner replied that he had been to the "priorities division" and had "talked to the boys down there, and they said that I was off the base in acquiring the copper wire in the first place, but that since I had it they saw no reason why I couldn't sell it" (R. 83, 89, 90, 91). Burdge retorted that such statements "amazed" him, and asked petitioner to identify the persons to whom he had spoken. Petitioner replied that he could not do so. (R. 83, 89, 90, 91.) Petitioner subsequently continued to sell copper wire to purchasers who held no WPB priorities (R. 326-330).

ARGUMENT

1. Petitioner's principal contention, based upon the theory of his defense at the trial, is that the evidence failed to show the requisite wilfulness on his part in his violations of the regulations (Pet. 4, 6, 20, 24). This contention is, we submit, without merit.

There was ample evidence that petitioner was well aware at all times of the necessity and importance of complying with War Production Board regulations in handling critical materials. In September 1942, when he acquired the excess materials from Lockheed, he was unable to buy some of the items released by Lockheed because "certain restrictions" had been placed upon him by the War Production Board, and because "a

lot of items were subject to priority regulations" (*supra*, p. 5). Thereafter, in October 1942, he was advised by Army Air Forces authorities that he would not be permitted to buy a quantity of steel from Lockheed because he lacked the necessary War Production Board priority (*supra*, pp. 6-7).

When petitioner acquired the copper wire and other materials from Lockheed, he was required, after considerable discussion of the matter (*supra*, p. 6), to certify on his purchase order that: "It is also understood that we as buyers, will not under any consideration release any of this material to anyone not in a position to furnish proper priorities or conformance with all rules and regulations as prescribed by the War Production Board." Moreover, in November 1942, prior to the sales in question, Sullivan, District Manager of the Redistribution Division of the WPB, asked petitioner, "since he proposed to buy surplus inventories," whether he had applied for authority to deal in "allocated materials." Petitioner replied that his applications had been denied, but that he would appeal. Sullivan then told him (R. 123-124) "that until his appeal was either granted or denied, he must not deal in allocated materials," and "by that I mean steel, copper and aluminum, and other surplus materials" (*supra*, p. 10). Petitioner, in fact, never did appeal, but ignored Sullivan's advice and proceeded to make the ille-

gal sales charged in the information. His true attitude was indicated, we think, when, in February 1943, he told Burdge, the WPB investigator who called upon him to discuss his sales of copper wire in violation of WPB regulations, "We do not feel very kindly to the War Production Board, and we have decided that if they will let us alone, we will let them alone" (*supra*, p. 13). It was further indicated by the fact that notwithstanding Burdge's investigation, petitioner made no attempt to comply with the regulations in making subsequent sales, but continued with his illegal course of conduct, and then when Burdge called to see him again, in July 1943, and expressed amazement that petitioner was still selling copper wire without receiving preference rated orders, petitioner gave the implausible excuse that he had obtained permission to do so from the "boys" at the "priorities division," but could not remember with whom he had talked (*supra*, p. 15).

Petitioner's only defense was that he believed in good faith that the Western Procurement Division, Army Air Forces, and not the WPB, was the controlling authority for distribution of the copper wire and that the sales in question were cleared by him with representatives of that office (R. 213, 214, 215-216, 217-218, 220-223). But this merely presented an issue of fact as to his intent, which the jury decided adversely to peti-

tioner. There can be no doubt, moreover, that the jury so found, because, although the trial judge refused to comment on the evidence (R. 273-274), he did present the issue squarely to the jury when he instructed them that although "neither the Army Air Forces, nor any agent or representative thereof, can relieve any person of the duty of obeying any rule, regulation, or order issued by the War Production Board * * * you may consider any acts or conversations of such representatives, as shown in the evidence, in order to determine whether or not the defendant in doing any act charged by any count of the information acted wilfully, as above defined" (R. 278-279). And during discussion of counsel's exception to this charge, on the ground that the Army Air Forces did have authority to control materials, the court, while refusing to change the instruction in that respect, reiterated: "The Court, however, has already instructed the jury that they may take into consideration the acts and conduct of the Army Air Forces, and that instruction still is valid in determining whether or not the defendant had the requisite intent" (R. 282-283). We submit, therefore, that since there was ample evidence to justify the jury's finding that petitioner wilfully committed the offenses charged, and since the jury refused to believe his claim that he was acting in good faith, which was pointedly called to their attention by the trial judge, petitioner's principal contention

presents no question for further review by this Court.⁸

2. Petitioner also contends (Pet. 4, 6, 16-19, 23-25) that the regulations involved were not sufficiently certain and definite to ground a criminal prosecution, and argues (Pet. 18, 22, 24) that this case affords the Court an opportunity to express for the first time its views concerning the required definiteness of administrative "legislation." But we think that the applicable regula-

⁸ Petitioner asserts that the court below upheld his conviction "on the somewhat unusual basis that defendant failed to demonstrate that his excuses were plausible," and refers (Pet. 13-14) specifically to the statement in the opinion (R. 362) that:

"There is no compelling inference from the testimony regarding the purported authority of the AAF that appellant did not willingly violate the law. We cannot say that the evidence negatives the suggestion that appellant was seeking plausible excuses for making the sales in the absence of legal authority to make them."

In this passage, we believe, the court was merely saying that it could find in the evidence no justifiable excuse for the petitioner's actions, and, if anything, was giving to petitioner the benefit of a more searching review of the evidence than that to which he was entitled on appeal. *Abrams v. United States*, 250 U. S. 616; *Hemphill v. United States*, 120 F. 2d 115, 117 (C. C. A. 9), certiorari denied, 314 U. S. 627. Petitioner's argument, moreover, carefully avoids reference to the fact that the court below stated (R. 360): "We are of the opinion that there was substantial evidence to support the verdict, which in this case required the conclusion of the jury that the unlawful acts had been performed wilfully." And he makes no mention of the circumstance that the court then summarized the evidence justifying this conclusion (R. 360-362).

tions provided a clear basis for petitioner's prosecution and conviction, and that in no sense can it be justly said that he was required to speculate at his peril as to their meaning (Pet. 23).

According to petitioner's own testimony (R. 206-207), he was regularly engaged in distributing to industry and trade a great variety of materials and parts, among which were "rivets, aluminum, steel, aircraft parts, instruments and almost anything that might be found at an aircraft plant."⁹ His activities were thus clearly within the express provisions of subparagraph (c) (2) of W. P. B. General Preference Order M-9-a covering all "industrial supplier[s] * * * or other person[s] engaged in the business of distributing * * * wire mill products"¹⁰ to in-

⁹ In October 1942, petitioner prepared a catalogue listing the materials he had acquired from Lockheed and distributed it to several hundred addresses, such as aircraft and radio companies and associated industries, government departments, and military stations and activities (R. 190-191, 196-197, 199-200, 211-212), thus representing himself to industry and trade as a supplier, *inter alia*, of copper wire. And between November 19, 1942, and September 30, 1943, he made 108 different sales of the copper wire in question to radio stations, moving picture studios, electrical, radio, and television companies, schools, governmental activities, and an aircraft manufacturer (R. 326-330).

¹⁰ Subparagraph (a) (6) of General Preference Order M-9-a defines "wire mill product" as "bare or insulated wire or cable for electrical conduction made from copper or copper base alloy" (*infra*, p. 27).

dustry or trade" (*infra*, p. 28).¹¹ Contrary to the implications of petitioner's argument (Pet. 16-17), little doubt could have been entertained by him as to the inapplicability of Priorities Regulation No. 13, since that regulation applied only to "special sales of idle or excess materials by persons who are not regularly engaged in the business of selling such materials" (*infra*, p. 29);¹² and, as the court below pointed out (R. 354), although subparagraph (c) (2) (iii) of that regulation did permit "a sale of a single lot of war material * * * at an aggregate price of less than \$100," the very next sentence stated, "This exception does not permit the dividing of a single lot having a value of over \$100 into smaller lots and selling such smaller lots for less than \$100 under this subparagraph" (*infra*, p. 30). It was thus plain that even the sales charged in counts 5, 6, and 9, each of which was for less than \$100, did not qualify as "special sales," for petitioner acquired all the wire in one lot, at \$.0067 per foot, or a total of \$4,475.60 (R. 71). As to the sale charged in count 7, contrary to petitioner's argument (Pet. 16-17), there was no proof that it was made to a

¹¹ Petitioner admits that "All of the transactions involved, indeed all of the sales by petitioner of the copper wire in question, were made in the ordinary course of business * * *" (Pet. 6-7).

¹² The sale of the wire by Lockheed to petitioner came within this regulation, since it was excess to the needs of the aircraft plant, which was "not regularly engaged in the business of selling" such wire.

wholesaler so as to bring it within the provisions of subparagraph (c) (2) (iv) and Schedule A of Priorities Regulation 13 (Pet. App. p. 25) permitting special sales to "wholesale dealers who sell the material in the form held by holder."

Neither should there have been any honest doubt, as petitioner implies there was (Pet. 16), as to the applicability of subparagraph (b) (1) of General Preference Order M-9-a to his sales of insulated copper wire, for that subparagraph applied to deliveries of "copper" and subparagraph (a) (1) defined "copper" as meaning the basic refined metal, such as "cathodes, wire bars, ingot bars, ingots, cakes, billets, wedge bars or other refined shapes, or copper shot or other forms produced by a refiner" (*infra*, p. 27).

It is obvious, we think, that each order and regulation to which petitioner refers had a clearly specified purpose, covering its own special and distinct field. There was no conflict between them, nor was any so vague and indefinite that petitioner was unable to determine in advance how to avoid an unlawful course of conduct. They, therefore, conformed to the standard recently laid down in *Kraus and Bros., Inc. v. United States*, No. 198, this Term, decided March 25, 1946, pp. 5-6, slip opinion. The confusion in the regulations sought to be suggested in the petition is the result simply of the industry of counsel. It is significant that at the trial

petitioner expressed no doubt as to the matters now raised, but merely claimed that he relied upon alleged permission from the Army Air Forces to make the deliveries charged and, as we have shown (*supra*, p. 3),¹¹⁻¹⁸ the jury refused to believe him, as they had a right to do.

3. Petitioner contends that the revocation of Priorities Regulation No. 10 on November 5, 1942, before any of the sales were made, removed any valid basis for his conviction (Pet. 4, 6, 13-14).

Each count of the amended information alleged that in making a sale of copper wire petitioner did "fill an order [not] bearing the appropriate allocation classification and purchaser's symbol and [not] bearing a preference rating of AA-5 or higher," and it "was stipulated or not contested" (Pet. 10) that the sales were so made by petitioner. The revocation of Priorities Regulation No. 10, on November 5, 1942 (7 F. R. 9028), eliminated the theretofore existing provision for the allocation classification and purchaser's symbol (7. F. R. 4198), leaving only the requirement for a preference rating of AA-5 or higher, insofar as the sales charged in the information were concerned. But this fact cannot be said to have prejudiced petitioner. In one respect it actually increased the burden of proof cast upon the Government, making petitioner's conviction dependent upon proof that all three items were missing from

the orders in question when the absence of only one would have been sufficient to establish guilt.¹³ In any event, the point is of no consequence, for, as petitioner admits, "all of the substantive acts were admitted by the [petitioner] upon the trial, and the only issue of fact presented to the jury was the element of wilfulness required by the Act" (Pet. 5).¹⁴

¹³ The trial court, in instructing the jury, required them to find that all three items were lacking from the orders for the particular wire (R. 276); and while technically this may have been erroneous, it benefited petitioner, as we have explained above. Contrary to petitioner's assertion (Pet. 15), moreover, we do not believe that it could have been vital in impelling the jury's finding of wilfulness on the part of petitioner.

¹⁴ Petitioner lists as one of the "questions presented" an alleged inconsistency in the jury's verdict of not guilty on count one and guilty on the other counts, when "the only issue of fact presented to the jury was the element of wilfulness required by the Act" (Pet. 5). In Appendix G to his petition, he argues that the rule established by this Court in *Dunn v. United States*, 284 U. S. 390, 393, that "consistency in the verdict is not required," should be reconsidered, because "there was not before the jury in the *Dunn* case a single issue as to the three counts" there involved (Pet. 34-35). But we see no compelling reason for reconsidering the rule adopted in the *Dunn* case and later reaffirmed in *Borum v. United States*, 284 U. S. 596, and *United States v. Dotterweich*, 320 U. S. 277, 279. As the Court said in the *Dunn* case, quoting with approval from *Steckler v. United States*, 7 F. 2d 59, 60 (C. C. A. 2): "We interpret the acquittal as no more than their [the jury's] assumption of a power which they had no right to exercise, but to which they were disposed through lenity." 284 U. S. at 393. And "juries may indulge in precisely such motives or vagaries." *United States v. Dotterweich*, *supra*.

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

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APRIL 1946.

APPENDIX

Section 2 (a) of the Second War Powers Act of 1942 (c. 199, Title III, § 301, 56 Stat. 177, 50 U. S. C. Supp IV, 633), after authorizing the President, in aid of the effective prosecution of the war, to determine priorities and allocate materials and issue regulations and orders in aid thereof, provides:

(5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than \$10,000 or imprisoned for not more than one year, or both.

War Production Board General Preference Order M-9-a (7 F. R. 3424, 5043), as amended August 1, 1942 (7 F. R. 5980), and October 30, 1942 (7 F. R. 8825), provided, in pertinent part as follows:

Whereas the national defense requirements have created a shortage of copper, copper base alloys and products thereof, as hereinafter defined, for defense, for private account, and for export, and it is necessary in public interest and to promote the defense of the United States, to conserve the supply and direct the distribution thereof:

Now, therefore, it is hereby ordered:

§ 933.2 *General Preference Order M-9-a—*
(a) *Definitions.* For the purpose of this

order: (1) "Copper" means copper metal which has been refined by any process of electrolysis or fire refining to a grade and in a form suitable for fabrication, such as cathodes, wire bars, ingot bars, ingots, cakes, billets, wedge bars or other refined shapes, or copper shot or other forms produced by a refiner.

* * * * *

(4) "Dealer" means one who receives physical delivery of copper and sells or holds the same for sale without change in form.

* * * * *

(6) "Wire mill product" means bare or insulated wire or cable for electrical conduction made from copper or copper base alloy.

(b) *Allocation of copper*—(1) *Deliveries of copper by dealers or refiners.* No delivery of copper shall be made by any dealer or refiner except upon presentation by the person requesting the delivery of an allocation certificate duly issued by the Director General for Operations (hereinafter called the Director); except that notwithstanding the foregoing, copper of foreign origin imported under bond or drawback agreement may be reexported by a refiner pursuant to an export license duly issued by the Office of Export Control, Board of Economic Warfare.

* * * * *

(c) *Deliveries of brass mill products or wire mill products.* Except as expressly authorized or directed by the Director:

(1) No brass mill or wire mill shall fill any order which has not been approved on a Form PD-59D.

(2) No industrial supplier, mill supplier, plumbing supply house or other person engaged in the business of distributing brass mill or wire mill products to industry or trade, shall deliver or cause to be delivered any brass mill product or wire mill product, unless such delivery is made to fill an order bearing the appropriate allocation classification and purchaser's symbol (pursuant to Priorities Regulation No. 10) and bearing a preference rating of AA-5 or higher.

* * * * *

War Production Board Priorities Regulation No. 10, issued June 1, 1942 (7 F. R. 4198), provided in pertinent part as follows:

ESTABLISHMENT OF ALLOCATION CLASSIFICATION SYSTEM

§ 944.31 *Priorities Regulation No. 10; Allocation classification system*—(a) *Classification system established*. There is hereby established an allocation classification system, in accordance with the instructions issued by the Director of Industry Operations on the date of issuance of this regulation. Except as provided in paragraph (b) below, the appropriate allocation classification symbol and purchaser's symbol as required by said instructions shall be indicated by every person placing a purchase order or contract on:

(1) All purchase orders or contracts placed after June 30, 1942;

(2) All purchase orders or contracts, either heretofore or hereafter placed, calling for delivery after July 31, 1942. Any person who has heretofore placed such a purchase order or contract may at any time hereafter and shall before July 31,

1942, notify the person with whom such purchase order or contract has been placed of the symbols applicable thereto.

(b) *Exceptions as to retail purchases.* The provisions of paragraph (a) hereof shall not be applicable to retail purchases, purchases by retailers or purchases by distributors for resale to retailers. Industrial and mill suppliers, warehouses and other businesses performing similar functions for industry shall not be deemed retailers for the purposes of this paragraph.

(This regulation was revoked November 5, 1942 (7 F. R. 9028)).

War Production Board Priorities Regulation No. 13, as amended to September 23, 1942 (7 F. R. 7522), provided in pertinent part as follows:

SPECIAL SALES OF IDLE OR FROZEN MATERIALS

§ 944.34. *Priorities Regulation 13—(a) Purpose.* The purpose of this regulation is to provide uniform rules governing special sales of idle or excess materials by persons who are not regularly engaged in the business of selling such materials, including distress and liquidation sales and sales by persons who, by reason of the effect of priority orders or for other reasons, cannot use such materials in the regular course of their business. This regulation does not authorize receipt or use of any material by any person in violation of any inventory, quota or use restrictions imposed by any order or regulation.

(b) *Definitions:* For the purposes of this regulation:

(1) "Sale" of a material includes any public or private sale, auction sale, sale upon foreclosure of any lien or mortgage,

or delivery of such material in exchange for money or for any other material and the sale of any warehouse receipt, bill of lading or other document evidencing an interest in such material, but does not include the pledge or mortgage or other creation of any lien upon such material or the transfer of possession of such material without any transfer of title.

(2) "Special sale" means any sale except that:

(i) A sale of any material by any person who regularly in the course of his business sells such material in the same form is not a special sale. * * *

* * * * *

(c) (2) Subject to paragraph (e) of this regulation, any person may make a special sale of any war material if the sale falls within one of the following categories, and no person may make any special sale of any war material if such sale does not fall within one of the following categories:

* * * * *

(iii) A sale of a single lot of war material * * * at an aggregate price of less than \$100. This exception does not permit the dividing of a single lot having a value of over \$100 into smaller lots and selling such smaller lots for less than \$100 under this subparagraph.

* * * * *

